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Supreme Court, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

Richard & Linda Simone/Jointly-PETITIONERS

Vs.

Worcester County Institution for Savings-RESPONDENT

PETITION FOR REVIEW OR REHEARING
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI
"Brief for Petitioners"

By PETITIONERS
Richard & Linda Simone, Pro-Se
11 Ida Road
Worcester, Ma. 01604
Tel: (508) 752-0795

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80 pp

QUESTIONS PRESENTED

1. IF EVIDENCE WHICH WAS PRESENTED AT DEPOSITION BY THE RESPONDANT IS DELETED AT TRIAL, & IF OTHER EVIDENCE DURING TRIAL IS BEING PORTRAYED TO EXIST IN THE EVIDENCE NOTEBOOK WHICH THE TRIAL JUDGE READS FROM, BUT DOES "NOT EXIST" IN THE EVIDENCE NOTEBOOK., IS THE TRIAL JUDGE'S DECISION VOID PER BANKRUPTCY RULE 9024 60(B)., & AS A RESULT WERE THE PETITIONERS RIGHTS TO A FAIR TRIAL VIOLATED.

2. "WHILE ON APPEAL", IS IT INCUMBANT ON THE ORIGINAL TRIAL COURT TO MAINTAIN & CONTROL FILES CONTAINING "ORIGINAL EXHIBITS, EVIDENCE, & EVIDENCE NOTEBOOK" WHICH WERE PRESENT DURING TRIAL.

3. IS IT THE DUTY OF A COURT OFFICER, WHO ESCORTED WITNESSES OUT OF THE COURTROOM IN THE MAINTAINANCE OF A SEQUESTRATION PROCESS, TO REPORT TO A TRIAL JUDGE DURING TRIAL IF A CO-PLAINTIFF IN THE MATTER ADVISES HIM THAT A MISTAKE IS BEING MADE REGARDING HER SEQUESTRATION & IS DEMANDING TO BE ALLOWED INTO THE COURTROOM.

4. IF A TRIAL JUDGE WAS MADE AWARE THAT A MISTAKE WAS BEING MADE AT TRIAL, REGARDING SEQUESTERING OF WITNESSES, WOULD A REASONABLE PERSON BELIEVE HE WOULD IMMEDIATELY BRING IT TO THE ATTENTION OF THE COUNSELLORS AT TRIAL, IN AN ATTEMPT TO MAKE SURE THAT THE PROPER WITNESSES ARE BEING SEQUESTERED.

5. IF ORAL ARGUMENT HAD BEEN GRANTED, WOULD THE PETITIONERS HAVE SHOWN SUFFDICIENT FACTS REGARDING THE ABOVE QUESTIONS.,& WOULD THE PETITIONERS HAVE SUFFICIENTLY SHOWN THAT THE APPEALS COURT ERRED & ITS DECISION WAS CLEARLY ERRONEOUS IN THAT:
"THE PETITIONERS APPRAISER" NOT ONLY TESTIFIED THAT HE APPRAISED PETITIONERS PROPERTY AS A 2 FAMILY ON TWO OCCASIONS & THAT A 2 FAMILY WOULD HAVE ATTRACTED "MORE BIDDERS"., BUT HE ALSO TESTIFIED THAT A 2 FAMILY WOULD HAVE BROUGHT A "HIGHER PRICE".

No._____

In The
Supreme Court of the United States
October Term 1995

Richard & Linda Simone/Jointly-Petitioners
Vs.
Worcester County Institution
For Savings-Respondent

Petition for Writ of Certiorari to the
U.S. Court Court of Appeals the First Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Richard & Linda Simone/Jointly, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the U.S. Court of Appeals for the 1st Circuit, who agreed with, and based its decision on one of three (3) U.S. District Court Orders which were clearly erroneous as a matter of fact & Law per U.S. Bankruptcy Rule 9024 60 (b) in that:

Evidence was not before the trial judge at trial & per Fed Rule 615 & its mistaken review of petitioners petition for rehearing or review in that; Petitioners "did object" to sequester process during bankruptcy proceeding & Petitioner Linda Simone "was prejudiced"., & that oral argument was never granted.

OPINIONS BELOW

U.S. District Court District of Massachusetts Orders dated December 21, 1993 appears in appendix A., June 23, 1994 appears in appendix B, & August 12, 1994 appears in appendix C., U.S. Bankruptcy Court decision on December 5, 1994 appears in appendix D., U.S. Bankruptcy Court decision on December 15, 1994 appears in appendix E.

JURISDICTION

The Court of Appeals opinion #94-1957 in this matter was filed on December 30, 1994 and appears in appendix F. The Court of Appeals opinion in this matter was filed on April 20, 1995 & appears in appendix G.

A timely motion for an extention of time to file petition for review or rehearing was filed on May 1, 1995. Petitioners petition for review appears in appendix H.
The Court of Appeals denial of the petition for review was issued on May 22, 1995 & appears in appendix I. Petitioners application for an extention of time to file writ of certiorari was granted & enlarged to October 19, 1995 & appears in appendix J. This courts Jurisdiction is involked under title 28 U.S.C. §158 (d).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Bankruptcy Rule 9024 60 (b) is set forth in appendix K. Fed R. Evid. 615 is set forth in appendix L.

STATEMENT OF THE CASE

Petitioners appealed bankruptcy decision #91-4240-JFQ on July 2, 1992 pursuant to Bankruptcy Rule 9024 60 (b) & Fed. R. Evid. 615 sequester of witnesses to the U.S. district Court of Massachusetts #92-40-138-NMG in that:
The trial judge's decision to dismiss was clearly erroneous as a matter of fact & law in that; Evidence was not before the trial judge during trial & that petitioners "did object" during the proceeding thru the court officer & counsel to Linda Simone being sequestered for the entire trial & that the error was on the court thru the court officer, who told her that he would notify the trial judge, & did'nt, & therefore was not reflected in the trial transcript., & that she "was prejudiced" as a result of her exclusion from the courtroom for the entire trial, as her testimony would have impeached the ATR appriaser's testimony in that the property was in fact appraised as a 2 family thus petitioners would have prevailed at trial., & would ahve prevailed on appeal if oral argument had been granted, in that; not only would the sale had attracted more bidders, but would have produced a "Higher Price".

REASONS FOR GRANTING THE WRIT

On December 21,1993 District Court denied appeal indicating its decision was "based on the record", but failed to address petitioners claim that Linda simone was improperly sequestered., <u>See Appendix A.</u>

Petitioners filed motion for reconsideration of the original briefs on appeal which directed the court to the trial transcript regarding evidence that was not before the trial judge., & argued that the improper sequestration of Linda Simone was not relected in the trial transcript. On June 23, 1994 District Court requested a copy of trial transcript indicating that transcript had never been submitted on appeal since "June 4, 1992"., See Appendix B 3rd Paragragh. On August 12, 1994 District Court's Order denied petitioners contention that Linda Simone was improperly sequestrated & that she was sequestered pursuant to counsel & time barred petitioners motion for reconsideration in that it was duplicative of petitioners motion to vacate its order dated December 23, 1993., SEE APPENDIX C 2ND & 3RD PARAGRAHS. Petitioners filed appeal to U.S. Court of appeals., While on appeal petitioners discovered that the "Original file" containing Original evidence & notebook were "missing" at the original trial court, & filed motion for hearing in that court., & on December 5, 1994 the same trial judge confirmed that "documents are missing" & denied motion for hearing.,SEE APPENDIX D PAGE 2.

Petitioners filed motion for reconsideration which was denied on December 15, 1994.,SEE APPENDIX E PAGE 2. The opinion of U.S. Court of appeals on April 20, 1995 in part: "Simones' brief contains myraid vague & unsupported claims of tampering with evidence & improper behavior by counsel for both parties"., SEE APPENDIX G PAGE 3, FOOTNOTE. However, Petitioners argued the opposite; Evidence is not in the evidence notebook the trial judge is reading from & was not presented at trial.,SEE APPENDIX H, PAGES 4 & 5 PARAGRAGHS 1 THRU 6. The trial Exhibit sheet reveals plaintiffs section "not checked off".,SEE APPENDIX M.

Trial transcript reveals evidence is "not before the trail judge" & counsel presents a bundle of papers with "No Exhibit #" & directs the trial judge to the defendants side of the notebook., SEE APPENDIX N PAGE 32 LINES 4 THRU 14.

Respondant's Counsel presented a "3 page" code report at deposition prior to trial indicating respondant became aware of code violations on June 20, 1991 which is 7 days after the June 13, 1991 sale.,SEE APPENDIX O, 1ST PAGE.

At trial, respondant presented a "2 page" code report dated June 2, 1992 & deleted first page of exhibit that had been presented at deposition SEE APPENDIX P.
Petitioners argue to this court that: Per bankruptcy Rule 9024 60 (b) that if evidence was not before the trial judge & evidence was deleted from trial either by mistake, Inadvertance or fraud, then the petitioners could'nt have recieved a fair trial., SEE APPENDIX K.

Petitioners argued throughout appeal that Linda Simone was improperly sequestered and was "not reflected in the trial transcript"., Further, it was the petitioners who requested a sequester in the "first place"., & the reason for this was that the defendants' deposition prior to trial revealed that "All meetings & discussions" to treat petitioners property as a single family were all "after the sale"., SEE APPENDIX Q PAGE 27 LINE 22 THRU PAGE 30 LINE 20., PAGE 33 LINE 2 THRU LINE 11., PAGE 57 LINE 10 THRU PAGE 58 LINE 21.

As a result of this deposition, petitioners paid their counsel & requested that the ATR appraiser be deposed. Subsequesntly the ATR appraiser was "not deposed"., As a result, petitioners requested their counsel to sequester the defendant from the appraiser at trial. Prior to trial petitioner Linda Simone was deposed because she escorted the appraiser thru the property during the November 1990 appraisal & would testify that the property was appraised as a 2 family, & that more bidders would have been at the sale & a higher price would have been attained.
Her son Dante Simone would have also testified to the same because he escorted the same appraiser thru the property during May 1991 when she (ATR appraiser) appraised the property as a two family.
On appeal the petitioners have argued that the error in the improper sequestration of Linda Simone was on the court & or the the court officer in that: she demanded thru the court officer(Joseph Walker) that she was the co-plaintiff & demanded to be allowed into the courtroom. The court officer told her he would check with the trial judge & get back to her. When he got back to her, he told her that she had to remain

outside. Petitioners argued that: if the court officer had checked with the trial judge, the judge more that likely would have brought this to the attention of both counsellors., but, he could not have told the trial judge because the trial transcript does not reflect her demands., SEE APPENDIX H PAGE 6 PARAGRAGH 7 THRU PAGE 16.

On April 20, 1995 U.S. Court of Appeals erred, in that: Petitioners professional auctioneer witness "only testified" that if the property were advertised as a two family, it would have attracted a "different audience"., SEE APPENDIX G PAGE 9 1ST PARAGRAGH.

If Oral argument were grated, petitioners would have shown that: auctioneer also testified that the property would have also produced a "Higher Price"., SEE APPENDIX N PAGE 113 LINE 10 THRU LINE 22., & PAGE 118 LINE 11 THRU LINE 14.

Petitioner was prejudiced by not testifying as the "higher price" would have cured deficiencies regarding the bankruptcy matter.

If Oral argument was granted then the opinion, SEE APPENDIX G PAGE 12., would have found for the Petitioners.

CONCLUSION

For the reasons above & below, a Writ of Certiorari should issue to review the judgment of the Court of appeals in the matter. 1

RESPECTFULLY SUBMITTED

Richard & Linda Simone, Pro-Se
11 Ida Road
Worcester, Ma. 01604
Tel: (508) 752-0795

Dated: December 28, 1995

1 If this court elects not to address the issues presented in this Writ at this time, we request that the Writ issue & that the matter be remanded to the Court of Appeals for redetermination in light of the denial of Oral Argument throughout appeal.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RICHARD & LINDA SIMONE PLAINTIFFS-APPELLANTS	)	BANKRUPTCY APPEAL
	)	CIVIL ACTION
VS.	)	NO. # 92-40138-3N
	)	
WORCESTER COUNTY INTITUTION FOR SAVINGS, DEFENDAT-APPELLEE.	)	
	)	

MEMORANDUM AND ORDER

GORTON, J.

Appellants, Richard & Linda Simone, bring this appeal from a judgment in adversary proceeding NO. 91-4240 in the United States Bankruptcy Court for the District of Massachusetts (Queenan, J.). The Bankruptcy Court dismissed Appellants' complaint and allowed the counterclaim of Appellee, Worcester County Institution for Savings (WCIS), in the amount of $22,804. The Simones, proceeding Pro-Se on this appeal, allege various improprieties and errors with respect to the bench trial below. WCIS contends that the Simones' appeal is frivolous and seeds to recover, as sanctions, its fees and costs of responding to this appeal. For the reasons stated below the judgment of the Bankruptcy Court is affirmed and WCIS' motion for sanctions is DENIED.

APPENDIX A

I. Background

The Simoness defaulted on first and second mortgages held by WCIS on their property located at 62 Harold Street, Worcester, Massachusetts. WCIS conducted a foreclosure sale of the subject property on June 13, 1991, after advertising it as a single family home. At the foreclosure sale, WCIS was the successful bidder at $94,500. The amount due under the mortgage notes was $117,304.

The Simones brought the undrlying adversary proceeding in Bankruptcy Court alleging that WCIS foreclosure sale was commercially unreasonable and constituted a violation of the Massachusetts Consumer Protection Act (M.G.L.c.93A). Specifically, the Simones' alleged that, because of an inacurate appraisal, WCIS advertised their property as a single-family home when, in fact, it is a two-family home. WCIS counterclaimed for the deficiency amount under the mortgage.

II. Discussion

Following a bench trail on June 4, 1992, the Bankruptcy Judge found that:

1) WCIS acted in good faith and relied upon a qualified appraising firm,

2) the appraisal was reasonable in determining that the property was essentially a single-family home,

3) the subject property would have been in violation of zoning laws if operated as a two-family home,

4) the fair market value of the property of the time of the sale was $135,000, and
5) WCIS acted in accordance with banking custom in bidding in at seventy percent of market value. Based upon his findings, the Bankruptcy Judge concluded that WCIS acted in a commercially reasonable fashion. 1

A. Single family Home Designation

WCIS retained ATR appraisal Consultants (ATR) to appraise the Simones' property. The Simones contend on apopeal that the Bankruptcy Judge erred in finding that ATR was reasonable in determining that their house was essentially a single-family home. The findings of fact of the Bankruptcy Court are binding on this Court unless clearly erroneous, but its conclussions of law are to be reviewed de novo., In re LaRoche 969 F2d 1299, 1301 (1st Cir.1992). Whether the conclusion of the Bankruptcy Court regarding ATR's appraisal is characterized as a question of fact or a mixed question of law and fact, this court finds that it is supported by the evidence.

The Simones argued at trial, and argue again on appeal that they rented out their basement & that, therfore, their property should have been advertised as a two-family home. The evidence presented at trial indicated that ATR's appraisal found,

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1 Because the Bankruptcy Judge specifically found that this was a commercially reasonable foreclosure, this court does not address his additional conclusion that the law in Massachusetts does not require that real estate foreclosures be conducted in commercially reasonable fashion.

among other things, that 1) an inspection notice issued by what Defendant-Appellee describes as Worcester's Department of Code Inspection" noted various code violations in the basement, 2) no variance had been obtained for the basement unit, and 3) without such a variance, the property as a two-family home violated the Worcester Zoning By-Law. Based upon those facts, ATR concluded that the highest and best use of the property was a single-family home. The record on appeal indicates that the Bankruptcy Court considered those facts and concluded that the appraiser had not acted unreasonable in determining that the Simones' home was essentially a single family home. Appellants have cited no evidence to indicate that the decision of the Bankruptcy Court was clearly erroneous or error as a matter of law. The decision of the Bankruptcy Court is therefore AFFIRMED.

B. WCIS'S MOTION FOR SANCTION

The Simones' also alleged various improprieties of ATR, the trial judge and their own trial counsel. WCIS argues that those allegations are frivolous and that the Court should impose sactions on the Simone's under Bankruptcy Rule 9011 and Fed. R App. P 38. The allegations are presented in conclusory form and are entireley without supporting evidence. Perhaphs they are frivolous, but not all of the Simones' appeal may be so characterized.

Their allegation that the trial court erred

in concluding that ATR's determination that their home was essentially a single-family home is not frivolous. WCIS's motion for sanctions is therefore DENIED.

ORDER

For the foregoing reasons, it is hereby ORDERED that:

1. The judgment of the Bankruptcy Court dismissing the complaint of the Plaintiffs-Appellants and allowing the claim of Defendant-appellee in the amount of $22,804. is AFFIRMED; and

2. the motions of Defendant-Appellee for sanctions is DENIED.

"S/_____"
Nathaniel M. Gorton
U.S. District Judge

DATED: December 21, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RICHARD & LINDA SIMONE, PLAINTIFFS/APPELLANTS	)	
Vs.	)	Bankruptcy Appeal Civil Action No. 92-40138-NMG
WORCESTER COUNTY INSTITUTION FOR SAVINGS, DEFENDANT/APPELLEE	)	

ORDER

Pending before this Court is a motion of the Plaintiff/Appellants, Richard & Linda Simone ("the Simones"), to present newly discovered evidence in connection with their motion to reconsider an Order of this Court affirming a judgment of the U.S. Bankruptcy Court.

The Simones' allegations of newly discovered evidence with respect to the alleged "partiality" of the Bankruptcy Judge fall far short of the standards for disqualification. See 28 U.S.C. §455(a); In re, Allied-Signal Inc., 891 F2d 967, 970-71 (1st cir. 1989). Those allegations are therefore insufficient grounds for relief from judgment under Fed.R.Civ.P 60(b) (2). The motion of the Simones to present newly discovered evidence is DENIED.

Also pending before this Court is the aforementioned motion of the Simones for reconsideration. With respect to that motion, it is hereby Ordered that the parties submit to this Court a copy of the trial transcript from the bankruptcy proceeding in this matter which was held on or about June 2, 1992. In this regard, the Court notes that both jparties have referred to specific pages of the trial transcript but neither party has provided the Court with a copy of the transcript.

SO ORDERED, DATED JUNE 23, 1994

"S/_____"
NATHANIEL M. GORTON
U.S. DISTRICT COURT

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RICHARD SIMONE AND LINDA SIMONE, Appellants, V. WORCESTER COUNTY INSTITUTION FOR SAVINGS, Appellee.	)	Bankruptcy Appeal Civil Action No. 9240138-NMG

ORDER

GORTON, J.

Pending before this Court are motions of the appellants, Richard & Linda Simone("the Simones"): 1) to reconsider this Court's Order, dated December 21, 1993, affirming a judgment of the United States Bankruptcy Court, 2) to vacate that same Order, and 3) for a new trial. Also pending before this Court are the motions of the appellee, Worcester County Institution for Savings ("WCIS"): to strike appellants' motion to vacate and 20 to stike appellants' motion for a new trial.

Having reviewed the trial transcript in connection with appellants' contention that Linda Simone was improperly sequestered at trial, and having concluded that she was sequestered pursuant to the motion of counsel for the Simones, it is hereby Ordered that appellants' motion to reconsider is DENIED.

Appellants; motion to vacate the Court's Order dated December 21, 1993, is duplicative of appellants' motion for reconsideration and is time barred by Bankruptcy Rule 8015. Accordingly, the motion of the appellants to vacate is DENIED.
Appellants' motion for a new trial is time barred by Fed.R.Civ.P.59 and Bankruptcy Rule 9023, and is therefore DENIED.

So Ordered.

"s/_____"
Nathaniel M. Gorton
United States District Court

DATED: AUGUST 12, 1994

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS

In Re; Richard & Linda Simone Plaintiffs/Appellants Vs Worcester County Insitution For Savings, Defendant/Appellee.	Adversary Proceeding # 91-4240-JFQ On Appeal to U.S. Court of Appeals #94-1957

PLAINTIFFS/APPELLANTS MOTION REQUESTIN HEARING REGARDING MISSING EXHIBITS, EVIDENCE, & EVIDENCE NOTEBOOK FROM ORIGINAL FILE FOLDER OF ADVERSARY PROCEEDING #91-4240-JFQ and MOTION REQUESTING INVESTIGATION.
and the reasons are as follows:

1. On October 24, 1994 Appellants files motion with this court to produce the original record of adversary proceeding #91-4240-JFQ of June 2, 1992 & requested and investigation into the whereabouts of evidence, exibits, & evidence notebook which were found missing from the file folder on October 21, 1994.

2. On November 16, 1994, Appellants requested the Deputy in charge(Judy Bique) to document the contents of the file folder., She refused to do so unless ordered.

3. As a result, On November 16, 1994 Appellants documented the file folder, the file reveals that all exhibits,evidence & evidence notebook are missing from this file.

4. The exhibits, Evidence & Notebook which were reproduced by the clerk for the appellants on July 28, 1992, supports allegations of Fraud upon the Court by the defendant, defendants counsellor & appellants counsellor., of which appellants have alleged on appeal.

5. Appellants documentation of contents of original file folder is attached to this motion. (See--Attached List of Items Documented On November 16, 1994)

6. Appellants allege that the integrity of the courts regarding this matter is at stake, & that the missing exhibits/evidence & Notebook of which appellants have alleged on appeal., "Fraud upon the Courts" by the parties named in paragraph #4 of this motion, further supports these allegations.

7. As of the date of this foregoing motion, no opposition has been filed by defendant or defendants counsellor.

Wherefore, Your appellants respectfully request this honorable court to hold hearing & conduct an investigation regarding this matter, so that the integrity of the courts regarding the custody of evidence of its trials is preserved, & for this court to deal with the parties who have been named by the appellants of comiting fraud on the court at trial.

Dated November 17, 1994

Respectfully Submitted

Richard & Linda Simone, Pro-Se
11 Ida Road
Worcester, Ma. 01604

CERTIFICATE OF SERVICE

We, Richard & Linda Simone certify that on 11/17/94 a copy of the forgoing was served by first class mail to : Defendants Cousel of record Lucille Brennan 370 main Street Worc. Ma. 01608., & Chapter 13 Trustee Cecilia Calabrese P.O. Box 257 Feeding Hills, Ma. 01030.

THE COURT HAS CONDUCTED A SEARCH & HAS DETERMINED IT DOES NOT HAVE THE MISSING DOCUMENTS. THEREFORE, THE REQUEST FOR HEARING IS DENIED.

12/5/94 "S/_____"
JAMES F. QUEENAN
U.S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE;	
Richard & Linda Simone	ADVERSARY PROCEEDING
PLAINTIFFS/APPELLANTS	#91-4240-JFQ
VS.	ON APPEAL TO U.S.
WORCESTER COUNTY INST.,	COURT OF APPEALS
FOR SAVINGS.	#94-1957
DEFENDANT/APPELLEE	COMM. OF MASS.
	SUPERIOR COURT LEGAL
	MALPRACTICE #94-1273

APPELLANTS MOTION FOR RECONSIDERATION ON MOTION FOR HEARING & INVESTIGATION FILED WITH THIS COURT ON NOVEMBER 17,1994. Re:MISSING EVIDENCE-EXHIBITS & EVIDENCE NOTEBOOK OF PROCEEDING #91-4240-JFQ. and the reasons are as follows:

1. This courts order of December 5, 1994 only verified what the appellants had already showed the court; that the documents are missing.

2. The Appellants motion requested an investigation., This courts "Search is only part of an investigation.

3. The missing documents appear to come at the heels of the appellants alleagations, which are fully supported with facts & evidence on appeal that: defendant & defendants counsel Lucille Brennan changed evidence prior to deposition then changed and suppressed evidence at trial., of which was heard by Judge James F. Queenan on June 4, 1992.

4. The missing documents also appeat to come at the heels of the appellants complaint & jury demand at Worcester Superior Court, which is fully supported with facts & evidence.,that the appellants former counsel Paul Merry, who represented them at trial suppressed evidence-conducted a secret meeting with Lucille Brennan, the defendant, & the "Un-Deposed Appraisor" during a sequester process at trial. & was the officer of the Court who told the Appellants & their son that the "trial as a set-up".

APPENDIX E

5. This courts order of 12/5/94 appears to show partiality by judge Quennan in that he failed to address or order an investigation into,"who removed these documents", When, How & Why were these documents removed., The partiality is that Judge Queenas close relationship with counsellor Brennan for 7 years at the Law firm of Bodwitch & Dewey as she was his legal aid & that they or their law firm also handled the accounts for the defendant WCIS Bank, as was shown in March 1994 thru Motion for Newly Discovered Evidence.

6. By not conducting a thorough investigation clearly shows that the Integrity of This Court is at Stake. & also shows Its Order appears to show partiality in that; The Careers of the Defendant, Lucille Brennan & Paul Merry are at stake., Otherwise, who else could benefit from the "Missing Exhibits, Evidence & Evidence Notebook.

7. If this court cannot conduct a thorough investigation, then, the appellants will conduct their own investigation through all legal channels, such as, an ivestigative agency who oversees the courts & through an investigation by a news organization, to ensure that the appellants Rights to a Fair Trial & to preserve the integrity of the Courts.

THEREFORE, for all the foregoing reasons, the appellants respectfully request this court to conduct a thorough investigation not only to preserve this Courts integrity, but to expose the parties involved of which appellants have alleged with "fraud upon the court.

Dated 12/14/94 RESPECTFULLY SUBMITTED

_____

Richard & Linda Simone, Pro-Se
11 Ida Rd. Worc. Ma. 01604

MOTION FOR RECONSIDERATION IS --DENIED
DATED, DECEMBER 15, 1994

"S/_____"
JAMES F. QUENNAN
U.S. BANKRUPTCY JUDGE

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
1606 JOHN W. McCORMACK
POST OFFICE AND COURTHOUSE
BOSTON, MASSACHUSETTS 02109
(617) 223-9057

NOTICE

No. 94-1957 December 30, 1994

Richard Simone & Linda Simone
Appellants

V.

Worcester County Institution For Savings
Appellee

To Counsel:

In accordance with Rule 34 of the Federal Rules of Appellate Procedure, as amended effective December 1,1993, this is to advise you that the three judges of a panel, after examination of the briefs and record, are unanimously of the opinion that oral argument is not needed in this case.

Consequently, under F.R.A.P. Rule 34(a), this case will be taken on submission of briefs without oral argument.

"S/_____"
Francis P. Scigliano, Clerk

FPS/cbm

Richard & Linda Simone
11 Ida Road
Worcester, Ma. 01604

Lucille B. Brennan, Esq.
Fletcher, Tilton & Whipple
370 Main Street
Worcester, Ma. 01608

APPENDIX F

(NOT FOR PUBLICATION)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1975

RICHARD & LINDA SIMONE
PLAINTIFFS, APPELLANTS

Vs.

WORCESTER COUNTY INSTITUTION FOR SAVINGS
DEFENDANT/APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(Hon. Nathaniel M. Gorton, U.S. DISTRICT JUDGE)

Before

Torruella, Chief Judge,
Selya and Boudin, Circuit Judges.

Richard & Linda Simone on brief pro se.
Lucille B. Brennan and Fletcher, Tilton & Whipple P.C. on brief for appellee.

APRIL 20, 1995

APPENDIX G

PER CURIUM. Plaintiff/Appellants Richard & Linda Simone(the simones)appeal from the district courts affirmance of the bankruptcy court's dismissal of their complaint and allowance of the counterclaim by the defendant, Worcester County Institution for Savings(WCIS). They also appeal from the district court denials of their motion to reconsider pursuant to Fed.R.CIV.P.59(e) and motion for reief from judgment pursuant to Fed. R.Civ.P.60(b). "In an appeal from district court review of a bankruptcy court order, we independently review the bankruptcy court's decision, applying the clearly erroneous standard to findings of fact and denovo review to conclusions of law. No special deference is owed to the district court's determinations."Grella v. Salem Five Cent Savings bank,

The Simones argue on appeal that the bankruptcy court erred in concluding that the defendant bank did not violate either its common law duty or Mass. Gen.L. ch.93A in failing to characterize their property as a two-family dwelling when advertising the foreclosure sale of the property. The Simones also contend that the bankruptcy court's error in granting plaintiffs' counsel's motion to sequester all witnesses, including Linda Simone(a party to the case), entitles them to a new trial.

Finally, they argue that the district court erred in denying their Rule 60(b) (2) motion seeking relief from the judgment on the ground of "newly discovered evidence" showing partiality of the bankruptcy judge who presided at the

June, 1992 trial. [1]

I. Breach of Common Law Duty of Mortgagee to Mortgagor

Massachusetts law regarding a mortgagee's responsibility to a mortgagor in the context of a forclosure sale is as follows:

> The Law governing a mortgagee's responsibility to the mortgagor in the exercise of a power of sale is relatively straighforward. The mortgagee "must act in good faith and must use reasonable diligence to protect the interests of the mortgagor." The mortgagee's duty is more exacting when it becomes the the buyer of the property. "When a party who is intrusted with a power to well attemps also to become the purchaser, he will be held to the stritest good faith and the utmost diligence for the protection of the rights of his principal." Consistent with these requirements, the mortgagee has a duty "to obtain for the property as large a price as possible."

Williams v. Resolution GGF Ov., 417 Mass. 377, 382-83 (1994) (citations omitted). However,"(t)he rule that 'mere inadequacy of (the foreclosure sale price alone does not necessarily show bad faith or lack of due diligence' has been repeated or applied by this court in many cases. "Seppala & Aho Construction Co. V. Peterson, 373 Mass. 316, 328 (1977).

---

1 . The Simones' brief contains myraid vague & unsupported claims of tampering with evidence & improper behavior by counsel for both parties. We reject those claims as completely unsupported by the record.

The bankruptcy court made the following factual findings at the June 2, 1992, proceeding:

> I find that the fair market value of the property at the time of the sale was $135,-000. I find that it was more likely thn not whether or not the sale was advertised as a two-family sale or as a sale with an in-law apartment or words of that affect.. that in June of '91, it was more likely that not that no qualified bidders would appear who would be prepared to bid more that seventy percent of fair market value. I find that the bank acted in accordance with custom that has developed over the last few years in bidding in at what it believed to be seventy percent of the fair market value. I do fined that there were code violations, and this property as a two-family would have been in violation of the zoning by-law., even though a certificate of occupancy had been issued.

In light of those findings, the court ruled that the advertising place by WCIS were not unreasonable. The appraiser, on whom the bank relied, "was not acting unreasonably in determining that this was essentially a..single family home".

The burden is on appellants to prove that the bankruptcy court's factual findings are clearly erroneous. See In re Payeur, 22 B.R. 516, 519 (U.S.Bankruptcy panel for the First Circuit, 19-82). Under the "clear error" standard of review, reversal is warranted only if after reviewing the entire record, the reviewing court is left with a "definite and firm conviction that a mistake has been committer." "I.C.C.

V. Holmes Trans.,Inc., 983 F.2d 1122 (1st Cir. 1983) (citation omitted).

WCIS hired ATR Appraisal Consultants (ATR) to prepare two appraisals of the subject property, one in November 1990 (prior to the first scheduled sale of the property, which was postponed when the Simones filed bankruptcy) and one in May, 1991 (prior to the scheduled sale of the property). The November appraisal noted in an addendum that the property consisted of a "multi-level style dwelling with finished basement set up as an in-law apartment.

ATR explained its decision to treat the dwelling as a single-family as follows:

> As the basement apartment contained windows which did not appear to be code and as its present layout created functional problems the subject was treated as a single family residence with finished basement. It should also be noted that current zoning requirements require an 8,000 sq. ft. lot for a two family dwelling. It is not known if a permit was filed in order to obtain a variance to allow for a two-family building.

The November report estimated the market value of the property to be $144,000.

ATR's May 1991 report, noting that "market appears to be declining,"estimated the property market value to be $135,000. The Second appraisal also treated the dwelling as a single family given the condition of the unit revealed by the November 1990 inlskpection. (ATR was unable to re-enter the

apartment for inspection in May 1991.) Both reports relied primarily upon the "sales Comparison Approach" as yeilding the most accurate estimate of the property's market value. ATR noted that "(t)ypically the price paid at foreclosure is substancially less than the indicated Market Value of the forclosed property". The May 1991 report estimated a forclosure sale value of between $108,000 and $115,000.

The Simones contend that ATR's appraisals were unreasonable in failing to treat the dwelling as a two-family and in failing to apply the "income approach" to estimating its market value. That contention is undercut, however, by their own appraiser's report. Thomas Head, an appraiser hired by the Simones, testified that his November, 1991 appraisal, which treated the dwelling as a two-family, estimated the market value of the jproperty to be $135,000. Therefore whether treating the dwelling as a single family with a finished basement or as a two family, the appraisals arrived at the same estimated market value. In addition, ATR researched the value of the property as a two-family dwelling and concluded in a June 18, 1991 letter to WCIS that the estimated value would remain in the $135,000 to $145,000 range.

At trial, Kimberly Comeau (one of the two ATR appriasers who prepared the reports) testified that her visit to the Building Department for the City of Worcester had revealed that current zoning requried a minimum lot size of

8,000 sq ft. for a two family dwelling at the relevant location. Given that the subject lot contained only 7,960 sq ft. and that htere was no evidence that a special kpermit had been granted, Ms. Comeau concluded that the use of the property as a two family dwelling would violate the applicable zoning laws. The Simones argue that the certificate of occupancy issued to them by the building in 1987, when they converted the basement to an apartment, demonstrates that the unit does not violate the zoning laws.

Even assuming, without deciding, that ATR erred in concluding that the use of the property as a two family dwelling violated the zoning laws , that error would not invalidate its estimate of market value or its treatment of the dwelling as a single-family. As Ms Comeau stated at trial, ATR's decision to appraise the dwelling as a single family dwelling was based upon a conclusion that "highest & best use of the subject property was a single family residence." She explained that she believed that the property would not be purchased as a two family for the following reasons:

> Well, based on our findings upon the inspction in which the layout of the basement was awkward and unconventional. We also had some questions as to possible code violations. In addition, we did consider the two family market, and due to risk involved in the two family market, we determined that the highest and best use of the property was that of a single family.

A May 1991, Code Inspection Report noted several violations in the basement apartment. Although that report was not recieved by WCIS until after the sale of the property, it confirms ATR's impression (noted in its reports that code violations were present in the basement unit. 2

WCIS admits that it considered the income from the second unit in granting a second mortgage on the subject property and that it insured the property as a two family. Those decisions however, may merely reflect the actual use of the property as a two family dwelling at the relevant times. It does not necessarily follow, and the Simones have failed to demonstrate, that WCIS was obligated to advertise the property as a two family because it was being used as such at the time of the sale. ATR determined that single family occupancy was the "highest and best use of the property:, i,e., " the most profitable and feasable" use. WCIS reasonable relied upon that determination in advertising the kproperty.

The Simones argue that if the property had been advertised as a two family dwelling, there would have been more bidders and, consequently, a higher purchase price would have

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2 The code inspection was performed in response to reports of violations by the upstairs tenant, who allegely offered to purchase the property for $154,000 in February 1991. The Simones cite the offer as evidence that WCIS could have obtained a higher price for the property if it had been advertised as a two-family. Mr. Simone admitted at his deposition, however, that the sale fell through for unknown reasons.

resulted. Plaintiff's professional auctioneer witness, however, only testified that if the property were advertised as a two family, it would have attracted a "different audience". Given ATR's reasonable conclusion that the highest and best use of the property was a single-family, WCIS' decision to advertise it as such did not violate its duty to the Simones.

Based upon the evidence, we conclude that the bankruptcy court did not err in dismissing the complaint. After reviewing the entire record, we are left with the "definite and firm conviction," I.C.C. v. Holmes Trans., Inc.,983 F.2d at 1129 that the bankruptcy courts' conclusion that WCIS acted in good faith was mistaken. Nor are we persuaded that the court was mistaken in clcluding that WCIS reasonably relied upon ATR's determination that the property was essentially a single family home.3 The bankruptcy court properly concluded that the Simones failed to lprove that the advertisement and sale of the foreclosed property amounted to a breach of WCIS common law duty to the Simones.

II. Mass. Gen. L. ch. 93A Violation

The complaint also alleged that WCIS' advertisement and sale of the forclosed property violater c. 93 §§ 2 and 9. Section 2 (a) of chapter 93(A) makes unlawful "unfair or deceptive

3 We note that the record indicates that the Simones did not object to the adveritsement of the dwelling as a single family until after the sale occurred, although the first advertisement was published approximetlely six months earlier, in November 1990.

acts or practices in the conduct of any trade or commerce." Section 9 authorizes suit by "(a)ny person, other that a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two..." Section 11 authorizes suit by persons who "engage( ) in the conduct of any trade or commerce."

It is unclear, and neither the bankruptcy court nor the district court addressed the issue, whether the Simones were "engaged in the conduct of trade or commerce" and, therefore, required to bring suit under § 11. The test is "whether the defendant's conduct giving rise to the 93A violation occurred in connection with..a plaintiff individual acting in a business context." Michael C. Gilleran, The Law of Chapter 93A § 8.5 (1989 & Supp. 1994). At the time of the foreclosure and sale, the Simones were renting the subject dwelling to two families, and were no longer living there themselves. Section 1(b) defines trade and commerce to include "the rent..of..any property.

It is unnecessary to resolve this issue, however, since the Simones have failed to meet the requisite standard under either § 11 or § 9. "The defendant in a §9 case will or will not have violated § 9 depending on whether the defendant acted in an equitable manner toward the plaintiff. The equity statdard in § 9 cases requires that the defendant's conduct not

have violated some established concept of unfairness or otherwise be immoral, unethical, oppressive or unscupulos.",M. Gilleran, supra, § 4.7 (citing cases); see also midwest precision services, Inc. V PTM Inds. Corp., 887 F2d 1128, 1139 (1st Cir. 1989).

The bankruptcy court specifically found that WCIS acted in good faith and that it behaved in a commercially reasonable manner. Given those findings, which were not clearly erroneous, we conclude that the Simones failed to establish that WCIS' conduct violated Mass. Gen. L. ch. 93A. Therefore, the bankruptcy court did not err in dismissing that claim.

III. Sequestering of Witnesses

The Simones argue on appeal, as the did in their motion for reconsideration, that the sequestering of Linda Simone during the trial violated their rights. Fed. R. Evid. 615 provides, in relevant part, as follows:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who ia a natural person.....

The district court ruled as follows in response to the Simones' motion for reconsideration:

> Having reviewed the trial transcript in connection with appellants'contention that Linda Simone was improperly sequestered at trial, and having concluded that she was sequestered pursuant to the motion of counsel for the Simones, it is hereby Ordered that appellants motion to reconsider is DENIED.

We agree with the district court that by moving for the sequestration of witnesses, specifically including Linda Simone, and by failing to object during the bankruptcy proceeding to the sequestering of Linda Simone, the Simones waived the issue. Cf. United States V Abbott, 30 F3d 71, 73 (7th Cir. 1994) (failure to move for exclusion of witnesses at trial consitutes waiver of argument on appeal that court erred in failing to exclude witness); Hull v Merck & Co., 758 F2d 1474, 1478 (11 Cir. 1985) (denying request for new trial where plaintiff had been excluded from courtroom in violation of Fed. R. Evid. 615(1), but plaintiff--after returning to the courtroom--agreed to proceed with trial).

Moreover, the Simones have failed to demonstrate any prejudice as a result of Linda Simone's exclusion from the courtroom. See united States v Bobo, 586 F.2d 355, 366 (5th Cir. 1978) (party seeking reversal on basis of violation of Fed. R. Evid. 615 must demonstrate prejudice therefrom), cert. denied, 440 U.S. 976 (1979).

IV. Partiality Claim

The Simones argue that the Bankruptcy Judge ought to have disqualified himself from presiding over the June 4, 1992, trial. They argue that his previous employment as an attorney at a law firm where defense counsel was then working as a paralegal, required his recusal. They further suggest an additional conflict: that the Judge's former law firm represented WCIS. A motion for recusal was not made to the bankruptcy court. Instead, the Simones raised the partiality issue for the first time in their Rule 60 (b) (2) motion for relief from judgment on the ground of newly discovered evidence.

The motion was filed and denies while the Simones' motion for reconsideration pusuant to Fed. R. Civ.P.59 (e) was pending. The Simones did not appeal from the denial of theri Rule 60 (b) motion and WCIS argues that, therefore, they have waived the issue. We need not decide the question of waiver since we conclude that the partiality claim is entirely without merit.

WCIS admits that its counsel" from October, 1978 through June 1985,... was a paralegal employed at the law firm of Bowdwitch & Dewey and during that time often worked with Judge Queenan, who during that same period, was a lawyer and member of the firm." Contrary to the Simones' contention on appeal however, those circumstances do not require recusal.

The relevant statute provides as follows:

> Any justice, judge or magistrate of the United Stes shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455. This court has interpreted the statute to require disqualification "only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the Judge's imkpartiality. "In re allied Signal, Inc., 891 F2d 967, 970 (1st Cir. 1989) (citations omitted), cet.denied, 495 U.SS. 957 (1990). WCIS' counse's employment, seven years earlier, as a paralegal at the firm where the Bankruptcy judge then worked as an attorney, and her work with the judge, on matters unrelated to the present controversary, do not provide a "reasonable abasis for doubting the judge's impartiality in this case. See Singer v Wadman, 745 F2d. 606, 608 (10th Cir. 1984) (holding that judge's former partnership with a lawyer for one of the defendants did not require disqualification), cert denied, 470 U.S. 1028 (1985).

Nor does the Simones' allegation that the Bankruptcy judge's former law firm represented WCIS require recusal. "(A) charge of partiality must be supported by a factual basis."Allied - Signal, 891 F2d at 970. Here, the Simones have provided only the following vague suggestion of partiality:

> (The Bankruptcy Judge) at one point either worked at the law firm of Bowdwitch & Dewey of Worcester Ma. or Fletcher Tilton & Whipple of Worcester, Ma/. and.....

either of these two firms handled the accounts for W.C.I.S. Bank.

Even if the factual basis were adequate, the alleged relationships would not necessarily require recusal. See National Auto Brokers v. General Motors Corp, 572 F.2d 953 n.9 (2d Cir. 1978) (citing § 455(b)(2) and noting that "(e)ven under the more stringent requirements of the current statute, ..the prior representation of (defendant) by (judge's prior law firm and judge) as to unrelated matters would not require him to recuse jimself"), cert.denied, 439 U.S. 1072 (1979).

For all the foregoing reasons, we affirm the district court's affirmance of the bankruptcy courts' dimissal of this case.

UNITED STATES COURT OF APPEALS
FOR THE FIRST DISTRICT

CASE #94-1957

Richard & Linda Simone
Plaintiffs/Appellants

Vs.

Worcester County Institution For Savings
Defendant/Appellee

Appellants Petition for Review or Rehearing of This Courts Order of April 20, 1995

Brief by Plaintiffs/Appellants

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APPENDIX H

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ISSUES PRESENTED	1
STATEMENT OF CASE	2
FACTS	4
ARGUMENT	9
ISSUE #1 & #2	12 & 13
ISSUE #3	15
ISSUE #4	16
CONCLUSION	17

TABLE OF AUTHORITIES

PAGE

BANKRUPTCY RULE 9024 60(b).....10 & 16

MASS. GEN. LAW CH. 93a.....12

FED. R. EVID. 615.....13

RED RULE 34.....15

ISSUES PRESENTED

Whether the U.S. Court of Appeals erred on April 20,1995 in denying Appellants appeal in that:

1. "The Simones' brief contains myraid vague and unsupported claims of tampering with evidence and improper behavior by counsel for both parties. We reject those claims as completely unsupported by the record."

2. "The Simones' failed to establish that WCIS' conduct violated Mass. Gen. L. Ch. 93a therefore, the Bankruptcy court did not err in dismissing that claim."

3. "We agree with the district court that by moving for the sequestration of witneses, specifically including Linda Simone and by failing to object during the bankruptcy proceeding to the sequestering of Linda Simone, the Simones' waived the issue."
" The Simones have failed to demonstrate any prejudice as a result of Linda Simone's exclusion from the courtroom."

4. "This court failed to grant appellants "Oral argument."

STATEMENT OF CASE

Appellants on appeal from the District Court of the findings of the U.S. Bankruptcy court on June 4, 1992 of which appellants have argued are clearly erroneous and in error as a matter of fact & law per bankruptcy rule 9024 60(b), as a result of appellant arguing that evidence was suppressed and altered at trial by both appellee and appellants counsellor.

On April 20, 1995 this court affirmed the district court's affirmance of the bankruptcy court's dismissal of this case. This court noted #1., "The Simones brief contains myraid vague and unsupported claims of tampering with evidence and improper behavior by counsel for both parties. We reject those claims as completely unsupported by the record."

The Appellants brief was lenthy and may have caused this court to come to that conclusion. The appellants brief for review will be brief, and will show this court that its decision is in error & clearly erroneous as a matter of fact & law.

This court stated in its decision that it agreed with the bankruptcy judge's decision., Therefore, this court is saying that it agrees with the bankruptcy judge's words in whole throughout the trial transcript.

The appellant allegations on appeal arise out of the words of the bankruptcy judge through the trial transcript., of which was supported by the bankruptcy clerk who documented the evidence for the appellants after trial., then after appealing to this court the same bankruptcy judge will confirm that "all the evidence, documents, & evidence notebook are missing."

So, since this court is in agreement with the bankruptcy court, then this court should also be in agreement with what the bankruptcy judge tells any reasonable person in several pages of the trial transcript. which is, "evidence is not before the court", and that evidence has been changed.

The appellants do not wish to waste the courts time, so we ask this court for "starters" to review only several pages of the trial transcript shown in the facts of this brief, which shows an attorney attempting to make it appear he is presenting evidence at trial without any exhibit #.

The facts will also show that WCIS did change two appraisals prior to deposition from that of a 2 family to that of a single family type, "by the appellee's own admissions at a sworn deposition", just prior to trial.

The facts will also show that a 3 page exhibit presented at deposition by the appellee was suppressed from trial and another version presented at trial.

The facts of this brief will show that the appellants have argued throughout their appeal that Linda Simone was improperly sequestered, and that both appellants "did object", and that she was prejudiced as a result of her exclusion from the courtroom from the "entire trial", & that the error was on the court through the court officer, & that appellants have even provided his name on appeal.

And lastly, as this court is aware, this court denied the appellants Oral argument, just as district court denied Oral argument. Appellants will show through the facts of this brief that if Oral argument had been granted this court would have found for the appellants.

FACTS

1. On page 32 of the Trial Transcript--Line 3 thru line 25....

"Appellants counsel presents a bundle of papers to the witness on the stand".....

"No Exhibit Number is mentioned by counsel"..

"The Court asks--" Have these been included in the book?",a (meaning evidence notebook judge reads from).....

"Mr. Merry responds"--"Yes they have your honor".

"The court asks"--"Where are we in the book then?".....

"Mr. Merry responds"--"Your honor, they're the same as defendant's 1 & 2, and they may be easier to use in that form".

2.(See appellants appendix of exhibits marked #44)

November appraisal--found in Plaintiffs section of the evidence notebook contained only 9 pages. "not marked as evidence".

"Noted in center of 1st page--By U.S. Bankruptcy clerk Mary Jane Leary on July 28, 1992."

(The clerk could not document the May appraisal, & could not document the 3 page code report because they were not in the evidence notebook.)

3. Defendants Exhibit #6 at trial 2 page code report dated 2 days before the trial 6/2/92.

(See appellants appendix of exhibits marked Page 37).

4. Defendants Exhibit P presented at deposition on 5/8/92, 3 page code report dated June 20, 1991 7 days after the sale.

(See appellants appendix of exhibits marked page 35.)

5. Defendants Exhibit T, Sworn deposition taken on 5/8/92., Defendant "treated the property as a single family after the sale".

(See appellants appendix of exhibits marked page 45).

6. U.S. Bankruptcy court order dated December 5, 1994 Judge Queenan confirms that "all documents are missing" from the Bankruptcy proceeding.

7. Regarding sequestration of Linda Simone: Appellants have argued throughout district court and this court that: "Appellants requested a sequestration in the first place"....

The reason the appellants requested a sequestration process is that: after the June 13, 1991 sale, defendants counsel (through attorneys letters) admitted that they were aware that the property was a 2 family, but had advertised the property as a single family "given the code report."....

When appellants counsel confronted defendant with the fact that defendant had advertised the property as a single family as early as November 1990 "which is 6 months prior to the May 17, 1991 code report., Defendant made insufficient settlement offer and stated that the appraisor had noted the code violations in both appraisals."

At deposition defendant stated numerous times that appellants property was "treated as a single family after the sale"., and, as a result of the defendant producing a 3 page code report dated 7 days after the sale, which shows defendant became aware of the code report after the sale.

So, appellants "paid for" & requested their counsel Attorney Merry to depose the Appraisor.

Appellants counsel Attorney Merry failed to depose the appraisor, and stated that defendants counsel vigorously oposes the appraisor being deposed.

So, prior to trial appellants demanded that he sequester the defendant from the appraisor and visversa during trial.

At trial, as counsel requested sequestration, Linda Simone (appellant) who was making her way towrds the plaintiffs table, was confronted by the court officer (Joseph Walker) and was escorted out of the courtroom.

She demanded through the court officer that a mistake was being made & that she was the plaintiff in the matter. The court officer told her to remain outside of the courtroom and that he would check with the trial judge and would get back to her.

Appellant Richard argued with counsellor Merry that the wrong persons were being sequestered, but he told the appellant to remain quiet or be held in contempt. Fearing being held in contempt appellant Richard Simone remained quiet.

The court officer returned to appellant Linda Simone who had been waiting outside the courtroom with her son Dante Simone who was also schedualed to testify, the court officer told her that the trial judge stated that she had to remain outside the courtroom.

Then, during a brief recess, appellant Linda Simone & her son Dante Simone observed the Defendants' counsellor, the

the appellants counsellor, the defendant & the appraisor go into a small room off the lobby & remained there for approx. 5-10 minutes., then, came out of the room & the appraisor resumed testifying on the stand.

Appellant Linda Simone was excluded from the entire trial.

Her testimony would have impeached the appraisor because linda Simone escorted the appriasor through the property during the November 1990 appraisal of the property & she was aware that the appriasor appraised the property as a two family.

Dante Simone would have impeached the apraisor because he escorted the appraisor through the property during the May 17, 1991 appraisal & he was aware that the appriasor appraised the property as a two family.

After trial, counsellor Merry told both appellants & their son Dante Simone that the trial was a "set-up"., These are the words of counsellor Merry, the appellants only conveyed this to the courts on appeal.

On appeal, appellants argued that the error in the sequester of Linda Simone was on the court through the court officer., in that;
The court officer told her that he would check with the trial judge, however, if he had told the trial judge that the plaintiff in the matter was demanding to be allowed into the courtroom, then "any reasonable person would have to believe that--the trial judge would have brought this to the attention of both counsellors during trial", then if this did occur then, the trial transcript would have reflected this., but this did not occur because the trial transcript does not reflect Linda Simone demanding to be allowed back into the courtroom.

Being that the transcript does not relect her demands, then any reasonable person would have to believe that:

"The court officer took it upon himself & excluded her from the courtroom", thus her rights to a fair trial were violated.

She requested a sequestration in the first place., She was the the plaintiff bringing the action, she was never allowed to testify, and she never entered the courtroom for the entire proceeding.

ARGUMENT

Since this court agreed with the bankruptcy court decision then, this court should agree with the trial judge on page 32 of the trial transcript that he cannot find the evidence that the appellants counsel is referring to., further, counsel does not mention any exhibit #, on a "bundle of papers".
(shown in facts #1 of this brief)....

"The trial judge is the first person that shows any reasonable person that the plaintiff's evidence is not in the evidence notebook".

"Appellants counsellor attempts to make you believe that the evidence is in the notebook", by then he guides the trial judge into the defendants section of the notebook".

" The second person that shows any reasonable person that the evidence was not in the evidence notebook for this trial is bankruptcy court' clerk (Mary Jane leary), who after trial documented the evidence notebook, and found that appellants cournse only submitted a portion of the November appraisal, & did not submit the may appraisal, & did not submit the 3 page code report of which he had taken at deposition of the defendant."

"The third persons who have been attempting to show the courts on appeal through Bankruptcy Rule 9024 60 b, are the appellants, who only conveyed to the courts what the record indicates., "Mistake, inadvertance, or fraud" per 9024 60b.

And further, "while on appeal the appellants being suspicious, requested the bankruptcy court to produce the entire record which contained (all exhibits, evidence & evidence notebook which the trial judge read from during trial)., & on December 5, 1994 the U.S. Bankruptcy courts' Order per J. Queenan stated that "all documents are missing", & denied appellants request for hearing. (See copy of appellants motion at U.S. Bankruptcy court presented to this court on appeal).

This courts Order of April 20, 1995 which rejected the appellants claims as unsupported by the record is in "error and clearly erroneous as a matter of fact & law per Bankruptcy Rule 9024 60b, and the reason it is in error is that the "appellants claims are based soley on the record as has been shown."

There is nothing vague about the fact that appellants counse attempts to present evidence at trial without an exhibit number., as has been shown.

There is nothing vague about the fact that the trial judge not being able to find the evidence in the evidence notebook during trial., as has been shown.

There is nothing vague about the fact that the bankruptcy clerk not being able to document the the plaintiffs side of the evidence notebook, the one portion of evidence she documented has no exhibit stamp. She confirms what the trial judge asked counsel, "have these been included in the book?"

The appellants argue that this court should have interpreted "the missing documents" as support for the appellants claims.

At trial defendants Exhibit #6 contained 2 pages & was recieved by defendant on June 2, 1992 signed by the code department., this is two days prior to the June 4, 1992 trial.

At deposition Defendant presented Exhibit #P which was a 3 (three page code report dated June 20, 1991 which was seven days after ther June 13, 1991 sale).

(See page 31 of defendants deposition--appellants appendix of exhibits marked #45)

The appellants argue, what is vague about the record...

The page submitted at deposition containing the June 20, 1991 date was deleted, and defendant Exhibit #6 for trial, contained only 2 pages.,

The page containing the June 20, 1991 date was not shown to the court, by either counsellor.

At deposition on May 8, 1992 one month prior to trial, defendant stated numerous times that "All meetings & discussions to treat the appellants property as a single family, were all after the sale".

(See appellants appendix of exhibits marked #45-- Defendants sworn deposition .,

See page, 25 line 17 thru page 34 line 12.

page, 57 line 10 thru page 59 line 15.

page, 71 line 6 thru page 72 line 6.

page, 79 line 16 thru page 81 line 16.

page 91 line 1 thru line 16.

"Appellants argue, there is nothing vague about the appellants property being treated as a single family after the sale."

"This shows any reasonable person that if the property was treated as a single family "after the sale", then, the appraisals which were of a two family type were changed to that of a single family type.", in an effort to cover-up their single family advertising on movember 16, 1990 & June 13, 1991 sale dates., Which is a violation of Mass. Gen Laws Ch. 93a.

Appellants request this court to rule on Issue #1 & #2:

Whether the U.S. court of appeals error on April 20, 1995 in denying the appellants appeal in that:

"The Simone's brief contains myraid vague and unsupported claims of tammpering with evidence and improper behavior by counsel for both parties. We reject those claims as completely unsupported by the record."

"The Simones' failed to establish that WCIS' conduct violated Mass. Gen. L. Ch. 93a. Therefore, the bankruptcy court did not err in dismissing that claim."

Regarding the sequestration of appellant Linda Simone, the appellants argue that this was "improper", & that the error was on the trial court through the court officer.

This courts' order of April 20, 1995 is in error as a matter of fact & Law per Fed. R. Evid. 615, & is clearly erroneous in that:

This court stated that, "by the Simones' failing to object during trial, the Simones' waive the issue". and that; " The Simones' have failed to demonstrated any prejudice as a result of Linda Simone's exclusion from the courtroom.

The appellants argue that, the facts contained in this brief, are the same that have been shown through the appellants appeal as has been shown in the facts of this brief marked #7.

The appellants argue that the opposite of what this court ruled is true: and that is, "The appellants did object through counsel, & through the court officer."

The fact that the trial transcript does not reflect the demands made by the appellants should be viewed by this court as support for the appellants claims, for it was the appellants who requested that a sequestration take place, so the question the appellants ask this court is, "Why would appellant Linda Simone want to be sequestered from an action that she brought."

This courts order of April 20, 1995 stated, "moreover, the Simones' have failed to demonstrate any prejudice as a result of Linda Simones' exclusion from the courtroom".

The appellants argue that the opposite is true, Linda Simone was excluded not only from the courtroom, but for the entire trial. Linda Simone, once she was sequestered never entered the courtroom again. Her rights to a fair trial were violated., the action that she brought she never got to see., Nor was she able to testify, and she should have.

Prior to the trial, the defendant deposed her., However, she never testified, and the appellants argue that her testimony would have impeached the testimony of the appraisor because Linda Simone escorted the appraisor through the property during the November 1990 appraisal process, when the appraisor appraised the property as a two family.

Therefore, appellants argue that Linda Simone was prejudiced as a result of the facts that have been shown.

Appellants request this court to rule on Issue #3.

Whether U.S. court of appeals erred on April 20, 1995 in denying appellants appeal in that:

"We agree with the district court that by moving for sequestration of witneses, specifically including Linda Simone and by failing to object during the bankruptcy proceeding to the sequestering of Linda Simone, the Simones' waive the issue.

" The Simones' have failed to demonstrate any prejudice as a result of Linda Simone's exclusion from the courtroom."

The appellants argue, that:

"Appellants throughout appeal through district court & through this court have been denied Oral argument.

On appeal to this court the appellants requested Oral argument per rule 34, which was denied by this court and stated that Oral argument is not needed in this case.

The appellants prior briefs were lengthy, but the allegations contained in those briefs were fully supported by the record as has been shown in this brief.

Therefore, if Oral argument had been allowed and it shold have, then, this court would not have come to the conclusion in its April 20, 1995 Order.

Appellants request this court to rule on Issue #4;

Whether U.S. Court of Appeals erred on April 20, 1995 in denying appellants appeal in that;

"This court failed to grant appellants "Oral Argument".

CONCLUSION

Appellants have shown through facts of this brief that the trial judge himself shows any reasonable person that:

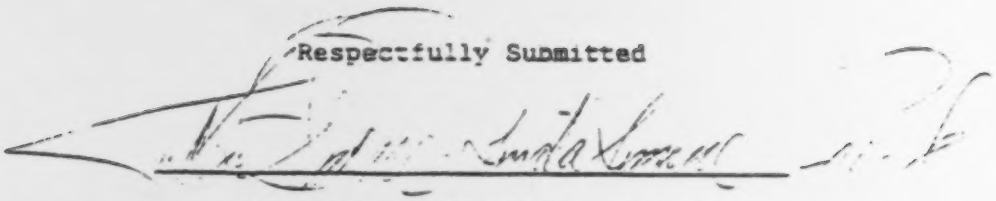
per bankruptcy Rule 9024 60b, that either mistake, inadvertance, or fraud at proceeding, then his decision is Void.

Further, the supporting facts throughout this brief shows any reasonable person that the appellants could not have recieved a fair trial.

Therefore, appellants respectfully request this court to grant Oral Argument, or grant the appellants a new trial as should be in this case.

Dated May 7, 1995

Respectfully Submitted



Richard & Linda Simone, Pro-Se

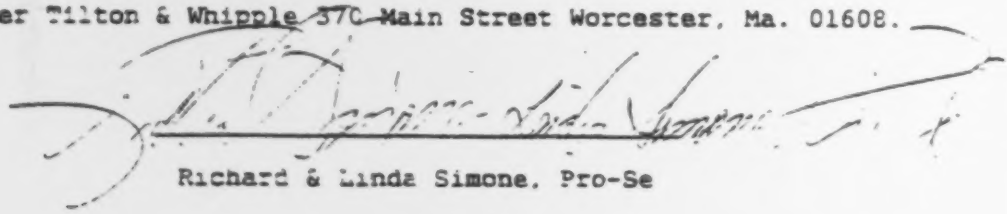
11 Ida Road

Worcester, Ma. 01604

Tel: (508) 754-2949

Certificate of Service

Appellants Richard & Linda Simone herby certify that on May 8, 1995 a copy of the foregoing Brief was mailed by first class Mail to Appellee's Counsel of record, Lucille Brennan & Fletcher Tilton & Whipple 370 Main Street Worcester, Ma. 01608.



Richard & Linda Simone, Pro-Se

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 94-1957

RICHARD & LINDA SIMONE
APPELLANTS

VS

WORCESTER COUNTY INSTITUTION FOR SAVINGS,
APPELLEE

BEFORE

Torruella, Chief Judge,
Selya & Boudin, Circuit Judges.

ORDER OF COURT

Entered May 22, 1995

Appellants' Petition for Review or Rehearing is DENIED.

By the Court

"S/_____"
Francis P. Scigliano

(cc: Mr. Simone, Ms. Simone & Ms. Brennan)

APPENDIX I

Supreme Court of the United States
Office of the Clerk
Washington, DC.

William Sutter
Clerk of the Court

Area Code 202
479-3011

August 14, 1995

Mr. Richard Simone
11 Ida Road
Worcester, Ma. 10604

Re: Richard Simone, et ux, Vs.,
Worcester County Institution for Savings
Application # A-146

Dear Mr. Simone:

The application for an extention of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on August 14, 1995, extended the time to and including October 19, 1995. This Letter has been sent to those designated on the attached notification list.

Sincerely
William K Suter, Clerk
By, "S/_____"
Sandra Elliot Spagnolo
Assistant Clerk

APPENDIX J

RULE 9024. RELIEF FROM JUDGMENT OR ORDER.

Rule FR CIV P applies in cases under the code except that: (1) a motion to re-open a case under the code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60 (b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by §727(e) of the code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by §1144, §1230, §1330.

RULE 60. RELIEF FROM JUDGMENT OR ORDER.

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertance; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reason: (1)mistake, inadvertance, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) Fraud (whether hereofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) THE JUDGMENT IS VOID; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independant action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Titley 28, USC, §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita review, are abolished, and the procedure for obtaining any relief from judgment shall be by motion as prescribed in these rules or by an independant action.

(as amended Dec.27, 1946, eff Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2 1987, eff Aug, 1987.)

RULE 615. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does no authoriz exclusion of (1) a party who is a natural person. or (2) and officer or employee of a party which is not a natual person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.
(As amended Mar. 2,1987, eff. Oct. 1, 1987; Apr.25 1988. eff. Nov. 1, 1988; Nov.18, 1988, Pub.L. 100-690, Title VII, §7075(a), 102 Stat.4405.)

NOTES OF ADVISORY COMMITTEE
ON 1972 PROPOSED RULES

The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 Wigmore §§ 1837-1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. Notime is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. (2) As the equivalent of the right of a natural person party to be present, a party which is not a natural person is entitled to have a representative present. most of the cases have involved allowing a police officer who has been charged of an investigation to remain in court despite the fact that he will be a witness. United States v. infanzon 235 F.2d 318 (2nd Cir. 1956) Portomene v. United States 221 F.2d 582 (5th Cir. 1955) Powell v. United States, 208 F2d 618(6th Cir. 1953); Jones v United States, 252 F.Supp. 781(W.D.Okl. 1966). Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. See California Evidence Code §777.

(3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore §1841,n.4

NOTES OF COMMITTEE ON THE JUDICIARY,
SENATE REPORT NO. 93-1277

Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness. The practice is permitted as an exception to the rule of exclusion and compares with the situation defense cousel finds himself in-he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time may be able to assist in meetin trial surprises where the best prepared counsel would other wise have difficulty. Yet, it would not seem the Government could ofthen meet the burden under rule 615 of showing that the agents presence is essential. Furthermore, it could be dangerous to use the agent as a witness as early in the case as possible, so that he might then help counsel as a nonwitness, since the agent's testimony could be needed in rebuttal. Using another nonwitness agent from the same investigative agency would not generally meet government counsel's needs.

This problem is solved if it is clear that investigative agents are within the group specified under the second exception made in the rule, for "an officer or employee of a party which is not a natural person designated as tis representative by its attorney." It is our understanding that this was the intention of the House committee It is certainly this committee's construction of the rule.

1987 & 1988 AMENDMENTS- The Amendments are technical. No substantive change is intended.

EDITORIAL NOTES

Codification. Amendment by Pub.L. 100-690, §7075.a), directing the insertion of "a" before "party which is not a natural person", could not be executed due to prior amendment by court order dated Apr.25,1988, which effected the same change, effective Nov. 1, 1988.

U.S. BANKRUPTCY COURT - EXHIBIT SHEET

Case Name: _____ Adversary Name: Richard & Linda Simone.

Case No. _____ Adversary No. 91-4240

Matter: _____

Date: 6/4/92 _____ PLTF: _____

DEFT: _____

EXH #	PLTF	DEFT	DATED	# PAGES / DOC	FORID	ADMTD	DESCRIPTION
1		X	11/1/90			X	APPRAISAL BY TRODELLA & COMEAU
2		X	5/17/91			X	APPRAISAL BY TRODELLA & COMEAU
3		X	6/19/91			X	APPRAISAL BY TRODELLA COMEAU
4		X	8/6/91			X	AMG FORECLOSURE REPORT
5		X	--			X	BROCHURE RE FORECLOSURE SALE
6		X	5/17/91			X	CODE INSPECTION REPORT
7		X	-----			X	ZONING ORDINANCE CITY OF WORC.
8.		X	8/11/91			X	93A LETTER FROM PAUL MERRY
9.		X	10/10/91			X	93A RESPONSE FROM LUCILLE BRENNAN
10		X	5/19/86			X	NOTE & MTG TO WCIS
11		X	3/30/88			X	NOTE & MTG TO WCIS

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF MASSACHUSETTS

RICHARD SIMONE	) CASE NO. 91-4240
DEBTOR,	) WORCHESTER, MASS.
V.	) JUNE 4, 1992
WORCESTER COUNTY INSTITUTION FOR SAVINGS, DEFENDANT.	) 10:30 A.M.

TRANSCRIPT OF TRIAL ON COMPALAINT TO RECOVER MONEY OR PROPERTY BEFORE THE HONORABLE JAMES F. QUEENAN, JR. J.U.S.B.C.

APPEARANCES:

FOR THE DEBTOR BY: PAUL MERRY, ESQ.
GARRITY & LEVIN
SUITE 1030, 99 SUMMER ST.
BOSTON, mA. 02110

FOR WCIS: BY: LUCILLE BRENNAN, ESQ.
FLETCHER TILTON & WHIPPLE
370 MAIN ST.
WORCESTER, MA. 01608

ELECTRIC SOUND RECORDING OPERATOR: KAIDA GUILFOYLE

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING
TRANSCRIPT PRODUCED BY TRANSCIPTION SERVICE.

****

GCI TRANSCRIPTION AND RECORDING SERVICES
505 HAMILTON AVE SUITE 107
LINWOOD, NEW JERSEY 08221
(609) 927-0299 FAX (609) 927-6420

****

APPENDIX N

Simone, but we also wish to call an appraiser who performed appraisals on behalf of the bank. There is some indications that--there's some curious details of some of the appraisals that were produced as part of discovery that give rise to the possibility, at least in my client's mind, that there are more that one set of appraisals and that appraisals may have been changed subsequent to.

The Court: And what other witnesses do you have?

Mr. Merry: We wish to examine the officer of the bank who was particularly responsible for this to learn the details of the decision-making, how the bank proceeded to make this, to our view, material error in how it presented this property to the market and we have Mr. Simone himself who can testify to many of the details of what I've outlined in the opening and his son and wife will also be able to testify to those matters. We also, as I mentioned, have an appraiser who can testify in support of value of the property and the effect of marketing it as a single-family instead of a two family.

The Court: Thank You.

Mr. Merry: Thank you, your honor.

The court: Let have an opening then from the bank, please.

Ms.Brennan: Good morning, your honor. Lucille Brennan for Worcester County Institution for savings. Your

The court: Yes, you may. The witness is your witness.
By Mr. Merry:
Q. I show you two stapled bundles of fourteen-eight and a half by fourteen pieces of paper, both of which say "uni-form residential apprtaisal report" at the top an various images of what look like punched holes. the first one is eleven sheets and I ask if you can identify that?
The Court: have these been included in the book?
Mr. Merry: Yes, they have, your honor.
The Court: Where are we in the book then?
Mr. Merry: Your honor, they're the same exhibits as defendant's 1 & 2, and they may be easier to use in that form.
The Witness: This is the appraisal which we origi--nally did in November of 1990.
By Mr. Merry:
Q. Thank You. I'm going to now hand you a second bundle of eight and a half by fourteen sheet of xerographed paper, as I indicated it says "Uniform Appraisal Report" at the top and at the bottom it bears the name of Kimberly D. Comeau and Anthony Trodella, MRA, and this has one-fifteen sheets. Can you identify that, please?
A. This is the second appraisal we did on the subject property back in May of 1991.

Seminars and conventions, so to speak, in the appraisal field.
Q. Have you ever supervised anyone in the appraisal line of work?
A. Yes, I have. I have people working for me.
Q. Have you ever heard of 62 Harold Street, Mr. Head?
A. Yes, I Have.
Q. Can you tell us, did you ever appraise 62 Harold Street?
A. Yes. I appraised 62 Harold Street first in 1988 at the request of Mr. Simone, and I agin did an - sort of an update recently, about two months ago--
Q. And--
A. --on the same property.
Q. Can you describe 62 Harold Street for the court, please?
A. 62 Harold Street is a split-type dwelling which was converted into a two-family utilizing the basement area as the second unit.
Q. And when you appriased it, how did you describe it in your appraisal?
A. As a two family
Mr. Merry: May I have a moment please, Your Honor?
The Court: Yes.
By Mr. Merry:

A. The area is zoned RL7, which under the city zoning bylaws allows for the use of two-family dwellings within that area.

Q. If sophisticated buyers in the Worcester market saw an advertisment for property on Harold street and it were identified as a single-family, would that be less attractive or more attractive?

Ms. Brennan: Objection. Speculation, your honor.

The Court: We are getting very speculative.

Mr. Merry: I'll withdraw the question.

The court: The witness has said, I think, that-- your opinion is single--two family homes are worth more than single-family homes?

The witness: Yes, your Honor.

The court: That's, of course, within--

The Witness: Based upon income, yeah.

The Court:- within certain areas. All right. I'll permit that. I will sustain that objection. go on. You're getting into speculation, I think. Let me ask, Mr. Head, we have your appraisal in evidence last November where you believe this to be worth $135,000 based-

The Witness: Yes, Your Honor.

The Court:- As a two family home, is that correct?

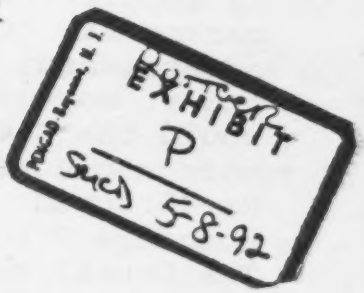
The Witness: Yes, Your Honor.

DEPARTMENT OF CODE INSPECTION
25 Meade Street
City of Worcester
Massachusetts

Carl H. Koontz
COMMISSIONER

Peter Cariglia
Assist. COMM.

JUNE 20, 1991



Lance Roettger
WCIS
365 Main St.
Worcester, Ma. 01608

Dear Mr. Roettger:

Enclosed you will find the copy of records on the property at 62 Harold Street., Worcester.

The fee for this copu of records is $1.00. Please make check payable to the City of Worcester.

APPENDIX O

I hereby certify under penalties of perjury that this is a true copy of the inspection report issued as a result of my inspection of the premises. 62 Harold Street. "S/_____"
M.S.,/INSPECTOR

DEPARTMENT OF CODE INSPECTION
25 Meade Street, Worcester, Ma. 01610
MAY 17, 1991

Carl H. Koonz
Commiossioner
Mr. Richard Simone
11 Ida Rd. Worc. Ma. 01604

Dear Mr. Simone:

The commissioner of code inspection, acting under Mass. Gen.L. Ch.111, Secs.127a & b as most recently amended and Chs. 1/11 of the Sanitary Code has caused an examination to be made of the dwelling located at 62 Harold St. in this city on May 6, 1991., According to the records of the assesors department this dwelling is owned by you. The examination has revealed that there are violations of the minimum standards of fitness for human habitation of the above mentioned sanitary code existing in this dwelling.

In a report of the examination made by the inspector the following violations were listed:

Regulations — Exterior and Common Areas

410.500 — 1. Decking at rear of structure is rotted in areas. Must be repaired.

First floor unit

410.351 — 2. Microwave oven in kitchen is defective. Must be repaired or removed.

410.401 — Basement unit

3. Floor to ceiling height throughout this dwelling unit is not at proper height. No room shall be considered habitable if more than three quarters of its floor area has a floor-to-ceiling height of less than 7 ft. as per 105 CMR Section 410.401 A. Must be corrected.

410.280. 4. Rooms about this dwelling unit are without ventilation. The owner shall provide for each habitable room and room containing a toilet, bathtub, or shower, ventilation to the outdoors consisting of (a) Windows, skylights, doors, or transoms in the exterior wall that can be easily opened to a minimum of 4 percent of the floor area

of that habitable room as per 105 CMR Sc.410.280. A.

410.250 b. Rooms about this dwelling unit are without natural light. The owner shall provide for each habitable room other than a kitchen transparent or tanslucent glass, which admits light from the outdoors & which is equal in area to no less than 8 % of this entire floor area of that room, as per 105 CMR Sec. 410.250 A.

You are hereby ordered to correct these violations within 30 days of receipt of this notice. A re-inspection of this dwelling will be conducted after the time for compliance w/ this order has elapsed.

Under regulation 410.850 of the sanitary code you are entitled to a hearing in this matter. Sec. 410.850 (a) reads as follows.

REGULATION 105 CMR 880 RIGHT TO HEARING

Unless otherwise specified in 105 CMR 410.000, the following persons may request a hearing before the commissioner of code inspection by filing a written petition.

A. Any person or persons upon whom any order has been served pursuant to any regulation of 105 CMR 410.000(except for an order issued after the requiremnents of regulation 410.831 have been satisfied); provided, such petition must be filed with in seven days after the day the order was served.

At the expiration of this period, if you have not taken action to correct the violations cited, this department will pursue any prescribed course of action in accordance with applicable laws & regulations which deems necessary, including the initiation of appropriate court action.

It is advisable that applications be made, when necessary, to the building Inspection Division, 25 Meade Street, for any required building, plumbing or wiring permits.

Very truly Yours

"S/_____"
Carl H. Koontz
Commissioner

hereby certify under penalties of perjury that
his is a true copy of the inspection report is-
ued as a result of my inspection of the premises.
2 Harold Street. "S/ M.S.,/INSPECT"

I certify this is an accurate reproduction as of this date of a record from the files of the Department of Code Inspection, Division of Housing Inspection
Signed
6-2-92

DEPARTMENT OF CODE INSPECTION
25 Meade Street, Worcester, Ma. 01
MAY 17, 1991

Carl H. Koonz/Com
Mr. Richard Simo
11 Ida Rd. Worc

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It is advisable that applications be made, when necessary, to the building Inspection Division, 25 Meade Street, for any required building, plumbing or wiring permits.

Very truly Yours

"S/_____"
Carl H. Koontz
Commissioner

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Richard and Linda Simone
Joint Debtors,

Richard and Linda Simone
Plaintiffs

-vs-

No. 90-42015JFQ

Worcester County Institution
for Savings,
Defendant

Deposition of Lance F. Roettger, taken on behalf of the Plaintiffs, pursuant to the applicable provisions of the Massachusetts Rules of Civil Procedure, before Susan M. Mcdermott, a shorthand reporter and notary Public within and for the commonwealth of Massachusetts, at the law offices of Garrity & Levin, 99 Summer Street, Boston, Massachusetts, 02110, on Friday, May 8, 1992, commencing at 10:27 a.m.

COMMONWEALTH COURT REPORTING
SUSAN M. MCDERMOTT
29 GARFIELD AVE.
HYDE PARK, MA. 02136
(617) 364-5865

APPENDIX Q

APPEARANCES

Paul H. Merry, Esquire
Garrity & Levin
99 Summer Street
Boston, Ma. 02110
Counsel for: Richard & Linda Simone

Lucille B. Brennan, Esquire
Fletcher, Tilton & Whipple
370 Main Street
Worcester, Ma. 01608
Counsel for: Worcester County
Institution for Savings

Also Present:
Richard C. Simone

Mr. Merry: Could that please be marked.

("Second Mortgage Property Value Analysis Report" marked Exhibit A for identification.)

Q Right below the spot that the stenographer just found to put the label on this exhibit, there is a series of four boxes, and there are some letters beside those boxes.

And I am going to ask you to take a look at those boxes and state for the record which one filled in and what the desination beside that is?

A I am not sure I know what we are--

Q Up in the upper right-hand corner of that exhibit that has been marked as Exhibit A, there are four boxes?

A Yes.

Q Can you tell us what is checked off for that piece of property?

A "Two to four units".

Q Thank you. Now, you testified a moment or two ago that you consulted with Mr.Berryhill and possibly others.

Were there any other people that you talked to about this property?

A I think I also talked to Steve Spangle who he reports to, but it was just in passing.

Q I am going to have to ask you to do your best to recall the dates of those conversations?

A Well, I couldn't give you specific dates, but those times we spoke would probaly be all after the issue of advertising, questions I had about the appraisal, since Mr. Simone raised issues here.

Q When to the best of your knowlidge were those conversations?

A I couldn't give you specific dates. They would all be--

Q --Prior to the foreclosure, probably not?

A No, No.

Q Subsequent to?

A Yes.

Q Now, do you know if there was more than one effort to foreclose on this property by the Worcester County Institution for Savings?

A Yes. My recollection is that there were

two,and the first time he filed a bankruptcy which put it off.

Q Do you recall when that was?

A Not specifically, but I would have to look that up.

Q How would you go about looking it up?

A I would look in the file.

Q You don't have the file with you today, do you?

A Yes, I do.

Q Would you like to look it up?

A Yes. We may have given the answer. are you adking me when the first sale was set, or when we began the first foreclosure, or could you be specific when you're asking me?

Q I am trying to establish the dates that you heard the conversation with the appraisers concerning 62 Harold Street?

A Well, it would not have been at the first foreclosure. It would be since Mr. Simone raised issues--well, since it was actually foreclosed.

Q Since June 13, '91 then?

A Since 13, '91 which is when we actually auctioned it off.
Q Did you discuss this with the appraisers prior to June 13, 1991?
A I don't believe I did.
Q How many conversations were there with the appraising department?
A Several.
Q Is that more than six or fewer that six?
A Something like a half dozen.
Q What did the appraisers tell you in those conversations if you remember?
A They told me a lot of things. Do you have a specific question?
Q Whatever you remember that they said that would bear on 62 Harold Street?
A Basically that the appraiser appraised the property and determined that there were code violations and that the highest and best use of that property was as a single family.

And we discussed highest and best use, and my recollection of highest and best use from my appraisal courses was being the highest value, the one use that would derive the

A David Berryhill.
Q Now, you mentioned code violations. How did those come to your attention, please?
A Well, they were first mentioned in the first appraisal we got at the time of the first foreclosure sale, as we were approaching the first forclosure sale, which was later postphoned because of the bankruptcy. We had an appraisao at that time, and in the appraisal, the appraiser refers to code violations.
Q Do you have a copy of that appraisal with you?
A Yes.
Q Could I see a copy of that, please?
A Yes.
Mr. Merry: off the record.
(brief discussion off the record.)
Q Do you know who performed the appraisal that you make reference to prior to the first foreclosure effor?
A Yes, Kimberly O. Comeau of Anthony Todella's officel
Q I am now going to had you these papers that

A Yes, we do. You may have the first one. I'm not sure about the second one.

Ms. Brennan: I have that.

Mr. Merry; Forgive me, but I haven't seen this before.

Ms. Brennan; Off the record.

(brief dissusion off the record.)

(brief recess taken.)

CONTINUED DIRECT EXAMINATION

Q (by mr. Merry) Mr. Roettger, you testified that discussions with the appraiser suggested that the property should be treated as a single-family property?

A Correct. I don't know as I testified to that, but that we had a discussion, and that was certainly the conclusion.

Q Who were the participants in the discussion?

A Mr. Berryhill and myself.

Q Anyone else?

A Well, we at one point had a meeting with seven or eight people that were there to discuss this whole situation.

Q When was that?

A I don't remember the specific date. It

Was after individual conversations I had had with Mr. Berryhill.

Q Was it before or after November of 1990?

A After.

Q Was it before or after June 13, 1991?

A After.

Q Now, was you discussion with Mr. Berrhill that you mentioned earlier prior to your discussion with these seven or eight people?

A Yes.

Q When did that occur?

A I don't remember. We had several chats.

Q And I am going to have to ask you to your best to rtecollection when those chats were in any way you can?

A Well, I can tell you that they were after the foreclosure sale.

Q Were there any discussions prior to the foreclosure sale?

A No, not to my knowledge anyway. I don't recall any. Let me put it that way.

Q I am going to to now hand you a stapled bundle of what look like eight & a half by fourteen pages, perhaps ten or twelve in

(code violations letter dated 6/20/91 marked Exhibit P for Identification)

Q Mr. Roettger, I am going to ask you to take a look at what has been marked as Exhibit P to your deposition, three pages, stapled, of Xerographic paper which is a letter to yourself from the department of code inspection for the city of Worcester, and I ask if you can direct my attention to the locations in those pages where there is noted a square footage violation by this property?

A Oh, there isn't. I said you would see that in the appraisal.

Mr. Merry: All right. I don't have any further questions at this time.

Ms Brennan: I have one question on cross-examination.

"S/_____"
Susan M. McDermott
Notary Public

(2)

Supreme Court, U.S.
FILED
FEB 1 1996
CLERK

No. 95-1066

In The

Supreme Court of the United States

October Term, 1995

RICHARD AND LINDA SIMONE,

Petitioners,

vs.

WORCESTER COUNTY INSTITUTION FOR SAVINGS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES M. BURGOYNE
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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming judgments dismissing Petitioners' case when Petitioners claim a party was wrongfully sequestered during trial.

2. Whether the Court of Appeals erred in affirming judgments dismissing Petitioners' case when Petitioners argue defects at trial regarding evidence.

3. Whether the Court of Appeals erred in affirming judgments dismissing Petitioners' case without granting the Petitioners' request for oral argument.

STATEMENT UNDER RULE 29.6

The parent company of Respondent, Worcester County Institution for Savings n/k/a The First National Bank of Boston, is Bank of Boston Corporation, which has issued shares to the public.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Under Rule 29.6	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below, Constitutional Provisions and Statutes Involved	1
Statement of the Case	1
A. Procedural History	2
B. Statement of Facts	2
Reasons for Denying the Writ	3
I. There has been no showing that the Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.	3
II. There are no compelling reasons for which this Petition should be granted.	4
Conclusion	6

Contents

Page

TABLE OF CITATIONS

Cases Cited:

United States v. Abbott, 30 F.3d 71 (7th Cir. 1994) 4

United States v. Bobo, 586 F.2d 355 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979) 4

United States v. Warren, 578 F.2d 1058 (5th Cir. 1978) . 4

Statute Cited:

Massachusetts Consumer Protection Act, M.G.L c. 93A 2

Rules Cited:

Federal Rule of Appellate Procedure 34 ..... 1, 5

Federal Rule of Evidence 615 3

Supreme Court Rule 15.2 2

United States Court of Appeals Local Rule No. 34.1 ... 1, 5

OPINIONS BELOW, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

On June 4, 1992, the United States Bankruptcy Court for the District of Massachusetts (Queenan, J.) (the "Bankruptcy Court") entered a judgment dismissing Petitioners' Complaint and allowing Respondent's claim in the amount of $22,804.

On December 21, 1993, the Honorable Nathaniel M. Gorton, United States District Judge at the United States District Court for the District of Massachusetts (the "District Court") entered an Order affirming the judgment of the Bankruptcy Court. Petitioners' Motion for Reconsideration was denied.

The United States Court of Appeals for the First Circuit (the "Court of Appeals") entered an Order on April 20, 1995 affirming the District Court's affirmance of the Bankruptcy Court's dismissal of Petitioners' case. Said opinion is endorsed to be "Not for Publication." Petitioners' request for rehearing was denied.

Respondent relies upon the following additional authorities:

Federal Rule of Appellate Procedure 34; and

Local Rule No. 34.1 of the United States Court of Appeals for the First Circuit.

STATEMENT OF THE CASE

Respondent submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by the Petitioners ("Petition"). This Brief in Opposition provides Respondent's reasons for denying the Petition, and addresses specific perceived misstatements and omissions of fact and law in the Petition.

A. Procedural History

The Petitioners filed the underlying adversary action with the Bankruptcy Court alleging that Respondent's foreclosure sale was commercially unreasonable and constituted a violation of Massachusetts Consumer Protection Act (M.G.L. c. 93A). At the conclusion of the trial heard on June 4, 1992, the trial judge dismissed the Petitioners' case and granted Respondent's claim for $22,804. Petitioners' Motion for Reconsideration was denied.

Petitioners' subsequent appeal to the District Court resulted in the District Court's affirming the decision of the Bankruptcy Court. Petitioners' Motion for Reconsideration was denied.

Petitioners then appealed to the Court of Appeals, which dispensed with hearing argument and affirmed the District Court's decision. Petitioners filed a Petition for Review or Rehearing which was also denied on or about May 22, 1995.

B. Statement of Facts

Respondent adopts the summary of facts contained in the section entitled "Background" in the District Court's Memorandum and Order (Pet. App. A).

Pursuant to Supreme Court Rule 15.2, Respondent also provides the following corrections of perceived misstatements and omissions of fact in Petitioners' Statement of Case (Petition, 2).

1. Petitioners misstate that there was evidence not before the trial judge during trial.

2. Petitioners misstate that Linda Simone was prejudiced as

a result of her exclusion from the courtroom during the trial since no prejudice has been demonstrated.

3. Petitioners omit that Linda Simone was sequestered at the request of Petitioners' counsel (Pet. App. G. 11-12).

4. Petitioners omit that Linda Simone was neither called by Petitioners to give testimony during the trial nor was she prohibited from testifying.

REASONS FOR DENYING THE WRIT

I.

THERE HAS BEEN NO SHOWING THAT THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

The only issue of federal law that is raised by the Petitioners in any comprehensible fashion is whether the sequestering of Linda Simone during the trial violated her rights. Federal Rule of Evidence 615 provides, in relevant part, as follows:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person. . .

Petitioners argue that Linda Simone, as a party, should not have been sequestered. However, in the instant case, Linda Simone was sequestered pursuant to Petitioners' own motion (Pet. App. C). Further, the Petitioners failed to object during the trial to the sequestering of Linda Simone. As the Court of

Appeals observed "... by failing to object during the bankruptcy proceeding to the sequestering of Linda Simone, the Simones waived the issue." *Cf. United States v. Abbott*, 30 F.3d 71, 73 (7th Cir. 1994) (failure to move for exclusion of witness at trial constitutes waiver of argument on appeal that the court erred in failing to exclude witness) (Pet. App. G-12). Moreover, as the Court of Appeals also pointed out (Pet. App. G-12), even if the Petitioners could demonstrate a violation of the sequestration rules, defendants must demonstrate that the violation created sufficient prejudice to warrant reversal. *See United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978) and *United States v. Bobo*, 586 F.2d 355,366 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). The only reference by the Petitioners to any prejudice suffered by Ms. Simone is their statement that "she was prejudiced as a result of her exclusion from the courtroom for the entire trial and that her testimony would have impeached the ATR appraiser's testimony" (Pet. at 2). However a review of the trial transcript indicates that Linda Simone was not prevented from testifying. In fact, although listed as a possible witness at the opening of the trial by Petitioners' trial counsel, Petitioners chose not to call her as a witness.

II.

THERE ARE NO COMPELLING REASONS FOR WHICH THIS PETITION SHOULD BE GRANTED.

The other reasons for which the Petitioners request this Court to grant their Petition are neither compelling nor important. Aside from their claim of wrongful sequestration of Linda Simone, which has already been addressed, Petitioners' remaining claims concern evidence not before the trial judge and evidence deleted from trial (Pet. at 2), and a denial of oral argument by the Court of Appeals. As to the former, the Petitioners claims are incomprehensible in that if the evidence

was not before the trial judge, it could not have been admitted as evidence. As to the latter, Rule 34 of the Federal Rules of Appellate Procedure provides that:

> Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed.

Local Rule 34.1 of the United States Court of Appeals for the First Circuit specifically permits the dispensing of oral argument if the court concludes after examination of the briefs and record that:

> (i) the appeal is frivolous; or
>
> (ii) the dispositive issue or set of issues has been authoritatively decided; or
>
> (iii) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Hence, the fact that on appeal the Petitioners were denied oral argument is not an appealable issue.

In essence, the Petitioners have provided this Court with no compelling reasons why their Petition should be granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
Feb 20 1996
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No. 95-1066

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

Richard & Linda Simone/Jointly - PETITIONERS

Vs.

Worcester County Institution for Savings- RESPONDENT

APPELLANTS PETITION FOR REVIEW OR REHEARING

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

By PETITIONERS

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29pp

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS..... i

OPINIONS BELOW,CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....1

STATEMENT OF CASE.....1

STATEMENT OF FACTS.....2

REASONS FOR GRANTING THE WRIT I.....9

REASONS FOR GRANTING THE WRIT II..... 9 & 10

CONCLUSION..... 10

APPENDIX 1A.....ATTACHED

" 1B..... "

" 1C..... "

" 2A..... "

" 2B..... "

" 2C..... "

" 2D..... "

" 3A..... "

" 3B..... "

" 4A..... "

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

OPINIONS BELOW, CONSITUTIONAL PROVISIONS AND STATUTES INVOLVED

On June 4, 1992, the U.S. Bankruptcy court for the district of Massachusetts (Queenan J), dimissed petitioners complaint. Petitioners appealed.

On December 21, 1993 U.S. District Court (Gorton,N) affirmed the judgement of the U.S. Bankruptcy Court. (Pet. App. A.)

On June 23, 1994 U.S. District court denied Motion for Newly discovered evidence, & ordered both parties to submit copies of the trial transcript of the June 4, 1992 trial.(Pet.App.B)

On August 12, 1994 U.S. District Court(Gorton,N.) affirmed the judgment of the U.S. Bankruptcy Court. (Pet.App.C). Petitioners Appealed.

On April 20, 1995 Petitioners appeal & request for rehearing was denied.(Pet. App. G.).

Petitioners rely on U.S. Bankruptcy Rule 9024 (60) b Mistake, Inadvertance or Fraud at trial, of which petitioners claim their rights to a Fair trial & Due Process at trial were violated & Fed. Rule 615 Petitioner Linda Simone's Rights during sequestration were violated. & Massachusetts Consumer Protection Act(M.G.L.ch.93 A.) Respondent misrepresented petitioners property on November 16, 1990 & again on June 13, 1991.& used deceptive acts & practices after the sale. (Pet.App.K & L).

STATEMENT OF THE CASE

Petitioners submit this reply brief in response to the Respondents brief in opposition. This brief addresses Respondents' reliance on & the U.S Court of Appeals' reliance on the opinion of the U.S. District Court Order dated December 21, 1993 (Pet.App.A). Petitioners will show how: this Order was Clearly Erroneous & in Error as a matter of fact & Law., which caused

the Opinion of the U.S. Court of Appeals to be clearly erroneous & in error as a matter of fact & Law by its reliance on that same Order, which basically recited the opinion of the U.S. Bankruptcy Court Order of June 4, 1992., of which petitioners have argued on appeal was in error and clearly erroneous as a matter of fact & law. This reply brief provides Petitioners reasons to Grant the Petition.

STATEMENT OF FACTS

1. Petitionser's were represented at U.S. Bankruptcy Court adversary proceeding on June 4, 1992 by counsellor Paul H. Merry of Boston Ma. The complaint contended that the respondent misrepresented the petitioners 2-family property by advertising it as a single family & attempted sale during November 1990., Then again advertising as a single-family during May 1991 & sold it as a single-family on June 13, 1991. The complaint also contended deceptive acts & practices after the sale., Per Mass. G.L. c.93A.

2. Prior to trial on May 8, 1992, Counsellor Merry deposed the Respondent. The Respondents sworn testimony is as follows.

A. "The discussions with the appraiser suggesting that the property should be treated as a single family, & others at the bank, "were all after the sale". (Pet. App. Q pages 27,28,29,30, 33,57,58.).

B. Respondent presented a Three (3) page code inspection report by the City of Worcester dated "June 20, 1991". which contained "No Square Footage Violation". (Pet. App. Q page 91).

C. Respondent presented two appraisals which were treated as a single family by the ATR appraiser., one appraisal dated November 1, 1990 & the second appraisal dated May 17, 1991. "Both of these appraisals contained "Zip Code 04604".

3. As a result, petitioners paid their counsellor to depose the ATR appraiser. "the ATR appraiser was not deposed".

4. Petitioners filed appeal July 1992 & paid $585.00 for trial transcript which was included & argued on appeal thru the U.S. District Court, through briefs & Reply Briefs., That:

A. At trial, A two page code report was in the evidence note-book, from which the trial judge reads. (Pet App P)

B. The Trial Judge was making a decision on a case without seeing the missing page., which contained the June 20, 1991 date., "Respondent became aware of the code report", "After the Sale."(Pet. App. O). (Pet App H.)

C. At trial, the Attorney's letters were admitted into evidence: "Which showed that for months after the sale Respondent blamed the code report for selling the property as a single family. (Pet App. attached to this brief 1A, 1B, 1C, 2A, 2B, 2C, 2D).

D. "The Trial Judge Stated:" "I'm not sure that they're going to add anything, Very Frankly, but I'll admit them". (Pet App. 3B page 53 thru 55 attached to brief).

E. At Trial, The Undeposed ATR Appraiser was "surprised to learn that the "Zip Code" on both appraisals presented at Deposition & at trial was the area for "BANGOR MAINE". (Pet.App. 3A Page 39 line 16 thru Page 40 Line 12, attached to this brief.)

F. Petitioners Property is Located in Worcester, Massachusetts.

G. Petitioners were in possession of a 2-family "Use & Occupancy Permit"., which contianed "No Zoning Restriction or Violation". (Pet App. A page 7, Line 7 thru 11).

H. There was "No Zoning Violation" by the code inspection department. (Pet. App. Q Page 91). or (Pet App O), or (Pet App P).

5. Prior to trial Petitioner Linda Simone was deposed by the respondent..

6. At trial, as a result of Petitioner Linda Simone being in the aisle when the sequester was called, she was escorted out of the court room along with her son Dante Simone who was also schedualed to testify, by the court officer (Joseph Walker).

A. She demanded thru the court officer to be allowed back into the courtroom and that she was the plaintiff in the matter & a mistake was being made.

B. The court officer told her to wait in the lobby while he checked her demands with the trial judge.

C. The court officer returned & told her she had to remain in the lobby.

D. As a result of remaining in the lobby, she & her observed the petitioners counsel, the respondents counsel, the respondent, & the ATR Appraiser, during a brief recess in between their testimony, go into a small room off the lobby for 5-10 minutes, then returned & resumed testimony.

E. Linda Simone was sequestered from the entire proceeding, she never re-entered the courtroom. Her testimony would have impeached the ATR appraiser, because she escorted the ATR appraiser through the property during the November 1990 appraisal of the property, and was aware that the ATR appraiser appraised the property as "Two-Family". (Pet App H).

F. Petitioners briefs on appeal to U.S. District Court, which were submitted to the U.S Court of Appeals in appendix form showed that petitioners did not recieve a fair trial & that as a result caused aggrevation, emotional distress & financial damages.

G. Immediately after trial, Petitioners cousellor told both petitioners & their son Dante Simone., That: "The trial was a Set-Up".

7. As a result of petitioners counsels' statement to them & as a result of his meeting in between testimony, petitioners dismissed him.

8. The U.S. District Court Order of December 21, 1993 "Was Not based on the "Record".,& is clearly erroneous as a matter of fact & Law.(Pet App A). and the reasons are as follows:

A. This Order never addressed Petitioners argument regarding Linda Simone's improper sequestration.

B. Only as a result of petitioners motion for reconsideration did this court request a copies of the "trial transcript". which was June 23, 1994. The second District Court Order. (Pet.App.B).

C. The third Order of the U.S. District Court dismised petitioners motions, & stated that Linda Simone was sequestered pursuant to counsel after reviewing the transcript. (Pet. App. C).

9. While on appeal to the U.S. Court of appeals petitioners became aware that the "Original file folder" at the U.S. Bankruptcy court where the trial originated became "Missing". All exhibits, the note-book from which the trial judge, & evidence. (Pet App D & E). & (Pet App 4 attached to this brief).

10 The Opinion of the U.S. Court of Appeals is Clearly erroneous & in error as a matter of fact & Law: and the reasons are as follows:

A. The Simones' brief contains myraid vague and unsupported claims of tampering with evidence and improper behavior by counsel for both parties. We reject those claims as completely unsupported by the record.(Pet App G footnote).

"The error here is that the court removed all of the petitioners argument which "was supported by record" & shown in Briefs/reply briefs through the U.S. District Court & through a 50 page brief before the U.S. Court of appeals.

"The court Erroneously placed a blanket over the petitioners briefs on appeal".

" The district Court order of December 21, 1993 which was shown to be clearly erroneous, gave some credibility to the petitioners argument"., (Pet App. A page 4 "B. WCIS Motion for Sanctions)

District Court Stated: The allegations are presented in conclusory form and are entirely without supporting evidence. "Perhaps they are frivolous, but not all of the Simones' appeal may be so characterized."

B. The U.S.Court of Appeals stated in its opinion that: " The ATR appraiser explained its decision to treat the dwelling as a single-family"." (Pet App G page 5).

"This is in error & clearly erroneous in that";

The court based this opinion without the deposition as has been shown, "The Respondent stated at deposition that the conversations with the appraiser suggesting to treat the dwelling as a single-family were "After the Sale".

Further, the attorneys' letters show that for months after the sale the Respondent "blamed the code report" as their reason for selling the property as a single-family.

The attorneys' letters show that in august of 1991, as a result of research at the liabrary, petitioners counsel advised the respondents counsel that the property had been advertised as a single-family during November 1990 many months prior to the code report of May 1991.

C. The opinion of the U.S Court of appeals stated: "Plaintiffs auctioneer "only" testified that if the property were advertised as a two family, it would have attracted a "different audience". (Pet App G page 5 1st paragragh).

This Opinion is in error & clearly erroneous as a matter of fact & Law:

and the reasons are as follows:

Petitioners auctioneer "also testified" that:

He appraised the Property as a "Two-Family"., on two occasions, 1988 and again in 1991. (Pet App N page 113 line 10 thru line 22).

He "Also testified" that two-familys' are worth more., than single families. (Pet App N page 118 Line 11 thru line 14).

D. The opinion of the U.S. Court of appeal stated: "It agreed with the District Court that by moving for the seqestration of witnesses specifically & including Linda Simone, and by failing to object during the bankruptcy proceeding to the sequestering of Linda Simone, the Simones' waived the issue."

"The opinion further stated that: moreover the Simones' have failed to show any prejudice as a result of Linda Simones' exclusion from the court-room". (Pet App G page 12).

This opinion is clearly erroneous & in error as a matter of fact & Law in that:

" On appeal since 1992, petitioners have maintained that it was the petitioners who requested a seqester of witnesses in the "first place" & the reason for this is that the Respondent was deposed & admitted that the property was treated as a single family "after the sale"., & the ATR appraiser who performed the appraisals was "Not deposed".

"Petitioner Linda Simone was "Deposed by the Respondent".

"Petitioners have always showed both courts that Linda Simone demanded to gain entrance into the courtroom through the court officer(Joseph Walker)., "Who told her that he would check with the trial judge".

"Petitioners have always argued that the court officer never told the trial judge that the plaintiff in the matter was improperly sequesterd."

"Petitioners have always shown the court that the trial transcript could not reflect her de-

mands." because the court officer never checked with the trial judge, Linda Simone & her son obseved him go into the courtroom & came right back out, he never approached the trial judge..

"Petitioners argued that the error was on the court through the court officer who was working under the direction of the trial judge.

"Petitioners argued that if the court officer had checked with the trial judge, as he told her he would, then any reasonable person would have to believe that the trial judge would have brought this to the attention of both counsellers, & then that would have been reflected in the trial transcript."

Petitioners have argued that Linda Simones', who had been deposed, testimony would have impeached the testimony of the "Undeposed ATR appraiser"., because linda Simone escorted the ATR appraiser thru the property on Nov 1, 1990 appraisal.

Petitioners have argued & showed that Linda Simones' rights to a fair trial were violated, & that, she was barred from an action that she brought, & that both petitioners financially damaged, caused emotional distress & agrevation. (Pet App. H)
(The above was argued additionally in briefs & Reply briefs on appeal to the U.S. District Court which were filed in petitioners appendix on appeal to U.S. Court of appeals).

E. The U.S. Court of appeals stated that: "A motion for recusal was not made to the bankruptcy court". (Pet App G page 13).

This opinion is clearly erroneous & in error as a matter of fact or law in that:

"Petitioners could not have brought this motion before the bankruptcy court, because petitioners became aware of the trial judge's close relationship with the Respondents counsel Lucille Brennan during February 1994."
(filed in briefs on appeal U.S. Court of appeal)

F. The opinion of the U.S. Court of appeals stated: WCIS admits that its counsel "from October, 1978 through June 1985... was a paralegal employed at the law firm of Bodwitch & Dewey and during that time often worked with judge Queenan,

who during that same period, was a lawyer and member of the firm.(Pet App G page 13).

REASONS FOR GRANTING THE WRIT

I.

Respondent adopted "background" in (Pet App A). The U.S. District Court Order dated December 21, 1993, was clearly erroneous in error as a matter of fact & Law", & could not have been based on the record".(Pet App.A).

1. The Order never addressed petitioners arguement regarding petitioner Linda Simones' Rights being violated at sequester process.

2. The U.S. District Judge wrote the decision on December 21, 1993, then ordered both parties to submit copies of the transcript 6 months later on June 23, 1994.(Pet.App.B paragraph 3).

II

The Attorneys letters shown in the facts of this brief, shows the deceptive acts & practices by the Respondent., per Mass.G L. 93A.

"For the trial judge to conclude that the Respondent acted in good faith, is clearly erroneous & in error as a matter of fact or law".

The Sworn deposition of the Respondent admitted that all meetings & discussions suggesting to treat the property as a single family "were all" "after the June 13, 1991 sale".

"Both appraisals" contained the "Zip Code" of Bangor, Maine., When in fact petitioners property is located Massachusetts., For the trial Judge to conclude that the appraisals were reasonable & that the appraisal firm is qualified is "Clearly erroneous & in error".

For the Trial Judge to conclude that the property "would" have been in violation of the zoning ordinances, when in fact it "was not" & there were "No Zoning Violations" against the property at time of sale, is "Clearly erroneous & in error as a matter of fact or law".

All of the facts shown were presented on appeal in Briefs & Reply Briefs to the U.S. District Court, & then all of the above was presented in appendix form along with a 37 page Brief to the U.S. Court of Appeals. & then by stating that the petitioners brief was vague & myraid, blanketed petitioners argument., & Led the U.S. Court of Appeals to Rely on the testimony of an "Un-deposed ATR appraiser", who had been seen take part in a meeting in-between testimony with Respondent, Respondents Counsel, & Petitioners Counsel., When in fact, these were the two persons who caused a sequester to take place at that trial.

The evidence which was not in the evidence notebook at trial., & Then the notebook became missing "while petitioners were on appeal to the U.S. Court of Appeals"., is in violation of U.S. Bankruptcy Rule 9024 60b., Mistake, Inadvertance, or Fraud.

For the Court to conclude that the "Deposed Petitioner Linda Simone, who was the Co-Plaintiff in the matter, was properly sequestered & showed no prejudice is Clearly Erroneous & in Error as a matter of fact & Law per Fed.R. 615.

PETITIONERS ARGUE HERE: THAT THEY COULD NOT & DID NOT RECIEVE A FAIR TRIAL, THUS THEIR RIGHTS TO DUE PROCESS WERE VIOLATED.

CONCLUSION

For all the forgoing reasons, & reasons in Petitioners petition, Petitioners Respectfully Request This Honorable court to Grant the Writ.

Dated February 19, 1996

RESPECTFULLY SUBMITTED

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Levin, Garrity, & Merry

Lucille Brennan
Fletcher Tilton & Whipple
370 Main Street
Worcester, Ma. 10608

July 12, 1991

In Re: Forclosure Sale of 62 Harold St. Worc. Ma.

Dear Lucy:

Thank you for your telephone call last week responding to my inquiry concerning the position of WCIS on 62 Harold Street.

As I indicated to you, my client Mr. Simone has provided me documentation concerning the status of this property as a two family home. I enclose for your review that docu;m;entation, which includes, as you can see, a loan made by WCIS on the basis of the building being a two family home; and a code inspection certificate from the City of Worcester certifying the dwelling as a two family home.

"When we spoke, you indicated that the bank's decision to advertise and sell this property as a single family home was based on recent code inspection" information suggesting that the basement apartment does not fully comply with relevant housing & building codes. I submit to you that code violations do not change the essential nature of a property. Where such documentation exists that this property has been certified & occupied as a two family home for a number of years and has been used to collateralize loans as a two-family home, a current status of being out of compliance with building codes does not transform the property into a single family home.

It appears conceivable, if not likely, that other interested parties, in an effort to reduce the sale value of this property may have requested the current inspection on which the bank relies in hope that code infractions might reduce the appraised value of the property (as apparently in fact happened).

BEST AVAILABLE COPY

My experience with housing inspections suggest that the vast majority of rental properties in Massachusetts have code violations of varying degrees at any given time. Many such code violations are readily remediable, often with minimal investment of time & money.

Mr.Simone remains persuaded that this property is a proper two-family home, notwithstanding whatever code violations may have been discovered during a recent inspection. Accordingly, he still believes that the bank has deprived him of a major financial asset which could go a long way towards improving his current situation in bankruptcy. Perhaps provision of the code inspection report showing the violations in the second unit within this home could shed additional light on this peculiar development.

I look forward to hearing from you with any further thoughts you have.

Very truly Yours
Garrity & Levin

7/12/91 "S_____"
Paul H. Merry

Fletcher Tilton & Whipple
370 Main Street Worc. Ma. 01608

July 15, 1991

Ms. Beverly J. Twine
Consumer Council of Worcester County
340 Main St, Rm 370
Worcester, Ma. 01608

Re: Your Case No. 91-06-7481
Complainant: Richard Simone. Our Client: WCIS.

Dear Ms. Twine:

Please be informed that this office represents WCIS in connection with the above-identified matter. Please accept this letter in response to the Complaint of Mr. Simone.

I appears from the Complaint that Mr. Simone suggest that the foreclosure sale held by WCIS on "June 13, 1991 was improper" in that the house was advertised as a single family house. Mr. Simones' complaint indicates that he believes it should have been advertised as a two family. "In response to his allegation, I enclose a copy of the code inspection report issued by the City of Worc. on May 17, 1991." Said report notes three significant violations concerning the basement unit which Mr. Simone, in the past, rented to tenants. After reviewing the report, I believe you will aggree with WCIS that it would have been improper for WCIS to advertise the house as a two family house when the rooms in the basement unit were not considered habitable. (See Violation #3).

In conclusion, WCIS believes that the foreclosure sale and the accompanying advertising was proper.

Should you have any questions, please do not hesitate to contact the undersigned.

Very Truly Yours

"S_____
Lucille B. Brennan

APPENDIX 1b

Fletcher, Tilton & Whipple
370 Main Street Worcester, Ma. 01608

Paul Merry, Esq.
Garrity & Levin
99 Summer St. Boston Ma.

July 16, 1991

Re: 62 Harold Street, Worcester.

Dear Paul:

I am in reciept of you letter of July 12, 1991, regarding the above-identified property.

After reviewing you letter and the accompaning enclosures, I can certainly understand your client's confusion. However,"in view of the enclosed Inspection Report, it is the position of WCIS that the advertising of the sale, as well as the sale itself, was commercially reasonable."

As you will note, the violations numbered #3,4 & 5 are not minor violations or readily remedile. The violations constitute significant and serious structural violations. Further #3 states that the rooms are not considered habitable. "The bank, having notice of these violations, would have been misrepresenting the property to advertise it as a two family house.

In addition, it appears that Mr. Simone was well aware of the manner in which the house was being advertised prior to the sale. Yet, he chose to raise his objection after the sale. Further, Mr. Simone knoew of the code inspection report. If he felt the report was erroneous, why did he not mention it to the bank, directly or through counsel. In that you an I had discussed the forthcoming sale in connection with the confirmation of the Order granting relief from stay, he certainly had an opportunity to raise the issue.

"In conclusion, it is WCIS's position that the foreclosure sale was conducted in a commercially reasonable manner and that the house was properly advertised given the code inspection report."

If you wish to discuss this matter, please do not hesitate to contact me,.

Very Truly Yours

"S_____

Lucille B. Brennan

APPENDIX 1C

Garrity & Levin
99 Summer Street Boston Ma.

Lucille Brennan, Esq.
370 Main St. Worc. Ma.

August 7, 1991

In Re: Forclosure Sale of Simone Propperty
62 Harold Street, Worcester.

Dear Lucy:

Thank you for yours of July 16, 1991 addressing the issue of the above sale. I regret I cannot subscribe to the position adopted by WCIS with respect to this matter, and must now make formal demand under Section 9 of Chapter 93a for a reasonable settlement offer with respect to this situation. Furthermore, please be advised my client has authorized me to file a Motion in the Bankruptcy Court seeking to set the sale aside.

The reasons for this position of Mr. Simone are as follows: First, as noted in my earlier correspondence, building code violations in a dwelling unit certainly do no mean that the unit no longer exists or is automatically uninhabitable. If this were the case, I am confident half the moderate and low income units in the Worcester residential market would be unavailable.

"Additionally, however, it is clear that WCIS advertised this dwelling for sale as a one-family as early as November of 1990, many months before the inspection (which took place in May of 1991) on which the bank now relies to rationalize its action." I believe I forwarded to you a photocopy of the newspaper advertisement for the November sale. If not I will be pleased to provide one.

Having advertised this dwelling in this way at that time, the bank may already have contributed to confusion over the nature of the property in the minds of buyers, and may therefore have discouraged some potential bidders. A claim for interference with advantagous contractual relations may also lie, as the erroneous November advertisement may have come to the attention of the purchaser with whom Mr. Simone had a purchase and

sale agreement. It was this purchaser, (at the time a tennant in the first unit of the home) who requested the May code inspection.

As you are aware, both the advertising which the bank did in November of 1990 and in May of 1991 was done despite the fact that the bank had previously loaned money to Mr. Simone relying on the full value of the house as a two-family. "Furthermore, Mr. Simone informs me that the bank has at least two appraisals for the property, both of which describe the house as a two family; and the bank also purchased or received evidence of insurance which indicated that the house was indeed a two family dwelling.

Mr. Simone also states he was unaware of the nature of the banks advertising until following the sale. In fact, his son attended the sale and learned for the first time of the bank's erroneous representation of the nature of the property at that time. Thereafter, Mr. Simone went to the liabrary to research the advertising and discovered the error.

Mr. Simone furthermore informs me that he recieved notice of the code violations in the unit on or about May 23, 1991, which suggests that the bank's adverisement appearing in the Sunday newspaper May 26, 1991 was in all likelihood prepared and sent to the newspaper prior to the bank's notification of the code violations.

With respect to the specific violations themselves, Mr. Simone informs me that they are substancially in error. Specifically, as to violation one, the decking has been repaired and does not pertain to the second unit. Violation two also relates to tenant owned property and does not bear on the second unit. With respect to violation four Mr. Simone informs me the bathroom has not only a window but a ventilation fan, either of which alone would satisfy the code requriements. The inspector was apparently confused on this point because the tenant in the unit had covered the bathroom window with some plastic material which may have hidden it from view. Concerning violation five, Mr. Simone informs me there are six (6) windows in the second unit for the four rooms that comprise that unit, and that accordingly this violation is also erroneous.

With respec to violation three, arguably the most serious problem, Mr. Simone informs me that double or triple carpeting was provided in the unit. This carpeting added somewhat to the apparent floor level, which may have caused the reported inadequacy of the florr to ceiling height; and can be remedied by removing the carpeting.

Irrespective of the nature and seriousness of the code violation, however, their pressence does not render the value of the second unit in this property a nullity such that it deserves no consideration in the advertising and sale of the house. Even if remedying the defects (whose actual presence has, as noted, been questioned by Mr. Simone) requires a significant investment, the fact that the unit has been cerified as occupiable in the past, has been occuped continuously, and is permitted under applicable zoning, contributes substancially to the value of this property.

It should not need argument that advertising a dwelling as a single-family attracts a dramatically different kind of clientel than advertising it as a two family. Indeed, it is kpossible that knowledgeable buyers would have specifically been discouraged from paritcipating in the sale on the assumption that this prope;rty was a single-family in a neighborhood zoned for two-family residences, generally a less desirable investment. In all events, buyers specifically seeking multi-family or investment properties would immediately have decided against pursuing this offering.

Given the full range of circumstances surrounding the advertising and conduct of this sale, including the bank's prior knowledge both by an appraisal and via insurance that the property is a two-family; the long standing permitting and occupancy of the second unit as a residence; and the timing of the advertisments in relation to the notification of the code violations, it appears to Mr. Simone that the bank made a serious error to his material financial detriment. Clearly, had the property been advertised and represented as being what it is (an "as is" sale has in the past been conducted under circumstances where code violations are present), it could reasonably be expected to have to have produced a significantly greaters return than in fact occured.

Accordingly, it is Mr. Simone's position that the sale as con-ducted was not commercially reasonable and was in fact in violation of applicable statutes.

Therefore, I look forward to learning from you the bank's settlement offer. As you are no doubt aware, failure to make a reasonable settlement offer within thirty (30) days of receipt of this letter exposes the bank to possible double or triple damages and the possible assessment of costs and reasonable attorneys fees.

Reasonable settlement of this dispute, in Mr. Simone's view, would require payment of a true value for the property (as indicated by the agreed sale price reached by Mr. Simone and the buyer with whom he had a purchase and sale agreement); and Mr. Simone's reasonable attorneys fees in pursuing this dispute.

Thank you for your continuing, attention to this matter, and I will look forward to your clients response.

Very Truly Yours
Garrity & Levin

"S_____"
Paul H, Merry

Garrity & Levin
99 Summer Street, Boston Ma. 02110

Lucille Brennan, Esq.
Fletcher Tilton & Whipple
370 Main Street
Worcester, Ma. 01608

August 12, 1991

In Re: Richard Simone Chapter 13 Debtor

Dear Lucy:

Please accept this as my request for a copy of the appraisal of property at 62 Harold Street Worcester, Ma., formerly owned by Richard Simone, which your client, WCIS conducted prior to its foreclosure sale on this property in June of this year.

Thank you for your anticipated cooperation.

Very Truly Yours
Garrity & Levin

"S_____"
Paul H. Merry

APPENDIX 2b

Garrity & Levin
99 Summer Street Boston, Ma. 02110

Defendants Exhibit
#8

Certified Mail # P981874749
President
WCIS
365 Main Street
Worcester, Ma. 01608

September 11, 1991

In Re; Consumer Protection Act Demand Letter
on Sale of 62 Harold Street

Dear Sir or Madam:

Attached to this letter please find a photocopy of a letter dated and sent August 7 of this year to your counse, Attorney Lucille Brennan, describing the circumstances of the above sale of real estate which constitute unfair and deceptive practices. Attorney ethical Rule 7-104 forbids direct contact between an attorney and a party the attorney knows to be represented by an attorney of its own without the consent of that attorney. However, Attorney Brennan has asked that the letter be sent to you.

As you see, the letter details the circumstances under which Mr Simone's former home, a two-family dwelling, was advertised on two separate occasions, and subsequently sold (bought by WCIS) as a single-family home. Advertising the house as a single-family could hardly be expected to attract buyers interested in multi-family or investment property; and this error by the bank has damaged Mr. Simone to the extent of the difference in value between the two properties.

The letter also makes notes the statutory provision of a thirty-day period in which the bank may make reasonable settlement offer, in the absence of which it may be exposed to payment of double or triple damages & attorneys' fees in the event a court finds in Mr. Simone's favor.

This letter with the attachment, represents Mr. Simone's demand for a reasonable offer of settlement as provided for in the statute. I look forward to your response.

"S_____"
Paul H. Merry

APPENDIX 2C

Fletcher Tilton & Whipple
370 Main Street Worcester, Ma.

Paul H. Merry, Esq.
Garrity & Levin
99 Summer Street
Boston ,Ma. 02110

Certified Mail
October 10, 1991

Re: Your Client: Richard Simone
Our Client: WCIS

Dear Mr. Merry:

Please be informed that this office represents WCIS. WCIS has received your letter of September 12, 1991 setting forth demands pursuant to G.L. c. 93A in connection with the foreclosure sale of 62 Harold St. in Worcester. This is in response to said letter.

Upon review of the circumstances and facts surrounding the sale, our client denies that it engaged in any unfair or deceptive acts or practices. Without restating all of the relevant facts, it is true that WCIS advertised the subject property as a single-family home. However, given the fact that the Department of Code Inspection for the City of Worcester issued a report which stated that the rooms in the basement did not meet required standards of habitability, WCIS contends that the advertisements as such were warranted. Further, it is true that WCIS advertised the dwelling as a one family in November 1990. However, an appraisal, conducted prior to the placement of the November advertising, noted that several aspects of the basement did not appear to meet code standards. Thus, it was treated as a single family residence with an unfinished basement. It is WCIS' position that although Mr. Simone chooses to assert that the subject real estate should have been advertised as a two family, to advertise the property as such, given the condition of the property at the time in question, would have certainly deceived and misrepresented the condition of the property to prospective purchasers.

As to the specific violations noted by the code inspector, you state that Mr. Simone claims "they are substaintially in error".

However, at no time prior to the sale, did Mr. Simone ever notify anyone from the bank that the violations were in error. It was not the obligation of WCIS to insure the accuracy of the content of a report issued by the department of Code Inspection prior to the foreclosure sale. In addition, to this date, noone has shown WCIS anything that would indicate that the code inspector's report was erroneous.

As to your allegation that the sale resulted in Mr. Simone suffering material financial detriment, WCIS does not agree that if the property had been advertised as a two-family that it would be reasonable to expect such a sale to have produced a greater return. On the contrary, if the property had been advertises and sold as a two family, given the condition of the property, it is quite possible that a lesser return would have been garnered from the sale.

All in all, WCIS is unwilling to pay Mr.Simone what he claims to be the true value for the property. Actually, it is surprising that Mr. Simone would claim that the value of the property is the sale price reached by Mr. Simone & a prospective buyer. It was my understanding that the buyer not only was unable to obtain financing for the purchase, but, also was the party that requested the May Code inspection. It would seem that the purchaser had some concerns about the property & its alleged value.

In conclusion, WCIS cannot & will not meet Mr. Simone's demand. However,in spirit of compromise & in the settlement of this matter, WCIS is willing to waive the deficiency claim that WCIS has against Simone under the subject notes & mortgages. This offer of settlement is not to be constued as an admission of wrongdoing by WCIS. If this offer of settlement is acceptable, please let me know within 10 days of your receipt of this letter.

Very Truly Yours

"S_____"

Lucille B. Brennan

Q You said in november 1990?
A Correct.
Q The Court: I'm sorry. Would you reat that question please.
Mr. Merry: I asked, your honor, when the observation about the window was made.
The Court: When was what we're reading here made in May of 91?
The Wirness: Yes.
By Mr. Merry:
Q. And the observations were made in Nov. 1990 about the window size. Is that correct?
A. That is correct.
Q Could you please point for me to the place on the Nov. 90 appraisal where there's any-- strike that. Miss Comeau, when you prepared these two appraisals, did you rely on the Nov. appraisal in producing the May appraisal?
A. No.
Q You stareted over again from scratch?
A. Yes. The only piece of information which we had to rely on is the assumption that the basement was in the same condition as we originally inspected.
Can you tell his honor what the zip code indicated for this piece of property was on the appraisal, both appraisals,

in fact?
A. On the May 91 appraisal the Zip code was 04604. On the Nov 90 appraisal the Zip code was 04604.
Q. Do you know where that Zip Code's located?
A I'm not sure what your asking.
Q Do you--
A Do I know what area that encompasses?
Q Yes.
A No, I do not.
Q Okay. Would it surprise you to know that that's Bangor Maine?
A Yes.
Q Did you ever see 62 Harold St without a swimming pool there?
A Ms. Brennan: Objection. Its been asked and answered several times.
The Court: It has been. The witness really has given her best memory, which she admits is a bit vague.
The Witness: Can I say something your honor?
The Court: You want to elaborate?
The Witness: All I wanted to say--
The Court: Go ahead.
The Witness:--was that if I hadn't noticed it is because that the market does not recognize--
The Court: If you hadn't noticed it or noted it?

Mr. Merry: I have shown it to Miss Brennan.
The Court: And that takes care of it?
Ms. Brennan: Yes, Your Honor. If he submits the complete one.
The Court: All Right. Well, let's have that then, if you--if that's--if you want to propose that now.
Mr. Merry: I'd be glad to, your Honor--
The Court: And What else?
Mr. Merry: Mr. Head is coming to the stand in the future, and we can do it through him--
The Court: And What else?
Ms. Brennan: Your honor, the other objection I have is regarding letters that Mr. Merry has included in his book which are between him and myself. Other than the 93A demand letter and our 93A response, I think they're irrelevant. They are not affidavits--
The Court: What--
Ms. Brennan:--of the parties.
The Court: What exhibit letters are these?
Mr. Merry: I and J your honor, on the second page of the index.
The Court: Whats the relevancy?
Mr. Merry: Your honor, the bank advertised and sold 62 Harold St. as a single family. Within days of-within one day of that occurance, they learned that

they'd made a mistake,& they began to try to rationalize their conduct, & the letters reflect that they used these purported and, in fact, found code violations which did not occur until many months after the first advertisement of the house as a single-family. They attempted to use that as a basis for rationalizing their erroneous and misperceived sale of the house and the letters from Attorney Brennan Substantiate that and my letters to Attorney Brennan requesing appraisals which were never responded to, the request was never responded to tend to show that--

The Court: These are two letter from you, Correct? We're talking about I and J?

Mr Merry: You honor, actually there is--there are several letters in each category.

The Court: I see.

Mr Merry: I think they're bundled together.

The Court: Uh-huh.

Mr Merry: The letter of Ms. Brennan on July 16 shows the banks reliance, both on the first page in the first-paragraph and in the--on the second page in the first--second paragraph there's a specific reliance upon a code inspection report of which the bank was unaware until June 20, seven days following the sale of the house.

The Court: What do you say, Miss Brennan?

Ms. Brennan: Your honor, I would respond that

again, those letters are not testimony of my client. They are not affidavits. I believe the 93a demand letter and the 93A response letter, your honor, are sufficient and they set forth the facts.

The Court: Well I'll admit them. I'm not sure that they're going to add anything, very frankly, but I'll admit them. So at this point, the--I have on this list in the notebook, into evidence at this point, because there's no objection, or if there's been an objection, I've overruled it. Exhibits numbered 1 thru 6 and Exhibits these are all plaintiffs exhibits, exhibits lettered A thru R. Now, perhaps, there was something else that came in We've had an S, have we?

Mr Merry: I'm sorry your honor. I mistook-S would be the last item that I offered, which was specifically the transcript of Mr. Roettgers deposition.

The Court: The Transcript?

Mr. Merry: Yes, Your Honor.

the Court: Okay. All right. Go ahead.

(where upon Defendant's Exhibit 1 thru 6 are admitted into evidence.)

Whereupon plaintiff's Exhibit A thru R are admitted into evidence)

DIRECT EXAMINATION By Mr. Merry:

United States Court of Appeals
For the First Circuit

No. 94-1957

RICHARD SIMONE AND LINDA SIMONE,
APPELLANTS

V.

WORCESTER COUNTY INSTITUTION FOR SAVINGS,
APPELLEE

ORDER OF THE COURT

Entered November 23, 1994

Appellants motion for investigation is Denied.

Appellants appendix of additional items is provionally accepted subject to the panel later striking or disregarding any items which are not properly part of the record.

By the Court

"S_____"
Francis P. Scigliano
Clerk.

APPENDIX 4 A

(4)

Supreme Court, U.S.
FILED
FEB 26 1996
CLERK

No. 95-1066

In The

Supreme Court of the United States

October Term 1995

RICHARD AND LINDA SIMONE,

Petitioners,

Vs.

WORCESTER COUNTY INSTITUTION FOR SAVINGS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITIONERS' SUPPLEMENTAL BRIEF

By PETITIONERS

Richard & Linda Simone, Pro-Se
11 Ida Road
Worcester, Ma. 01604
Tel: (508) 752-0795

9 pp

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS.....i

OPINIONS BELOW,CONSTITUTIONAL PROVISIONS & STATUES INVOLVED.....1

STATEMENT OF CASE.....2

STATEMENT OF FACTS.....2

REASONS FOR GRANTING THE WRIT I.....3

" " " " " II.....4

" " " " " III....5

CONCLUSION.....7

OPINIONS BELOW, CONTITUTIONAL PROVISIONS AND STATUES INVOLVED

On June 4, 1992, the U.S. Bankruptcy Court for the District of Massachusetts (Queenan J) dismissed Pettitioners Complaint., Petitioners appealed.

On December 21, 1993, U.S. District Court (Gorton,N) affirmed the judgement of the U.S.Bankruptcy Court(Pet.App.A).

On June 23, 1994, U.S. District Court denied Petitioners Motion for Newly Discovered Evidence & Ordered both parties to submit copies of the Trial Transcript of the June 4, 1992 Trial(Pet.App.B)

On August 12, 1994 U.S. District Court(Gorton,N) affirmed the judgment of the U.S.Bankruptcy Court(Pet.App.C). Pettitioners appealed.

On Decemer 30, 1994 U.S. Court of appeals for the First Circuit denied Oral Argument(Pet.App.F).

On April 20, 1995 U.S. Court of Appeals for the First Circuit affirmed the Bankruptcy Court's dismissal of Petitioners' case. Petitioners request for rehearing was denied.

Petitioners rely on U.S. Bankruptcy Rule 9024 (60)b Mistake, Inadvertance, or Fraud at trial,of which Petitioners claim their Rights to a Fair Trial were Violated, Thus their Rights to Due Process were Violated., & Fed.R. 615 Petitioner Linda Simone's Rights during Sequestration were violated. & Massachusetts Consumer Protection Act(MASS.G.L.ch. 93A.), in that Respondent misrepresented Petitioners property on November 16, 1990& again on June 13, 1991 & used deceptive acts & practices after the sale.

STATEMENT OF THE CASE

Petitioners submit this Supplemental brief in response to Respondents Brief in Opposition. Petitioners Reply Brief, to Respondents Brief in opposition, would have exceeded 10 pages.

STATEMENT OF FACTS

Petitioners rely on the three (3) Orders of the U.S. District Court dated December 21, 1993, June 23, 1994, & August 12, 1994.

Petitioners also rely on the opinions of the U.S.Court of Appeals which denied Oral argument(Pet.App F), & its denial of Petitioners appeal(Pet App G), & its denial of Petitioners request for an investigation of "Missing Evidence Notebook & Missing Exhibits" which was used at trial.(Pet App. 4A attached to Petitioners "Reply Brief to brief in opposition).

Pursuant to Supreme Court Rule 15.7, Petitioners also provides the following corrections of perceived misstatements & ommissions of fact in "Respondents Statement of Facts & Respondents reasons for denying petition". (Respondents Brief in Opposition, "B. Statement of facts 1. & reasons for denying petition II).

1. Respondent misstated by stating only that: "Petitioners misstate that there was evidence not before the trial judge during trial".

2. Respondent misstated by stating: "Petitioners claims are incomprhensible in the if evidence was not before the trial judge, it could not have been admitted as evidence.

3. Respondents' misinterpretation of Petitioners question to this court regarding Oral Argument.

REASONS FOR GRANTING THE WRIT

I.

Petitioner's Questions in Writ of Certiorari was; "If evidence which was presented at deposition by the Respondent is deleted at trial?"

"Respondent presented a three(3) page code report at deposition, the first page contained the date June 20, 1991. The Code report was issued on May 17, 1991, the single family sale occured on June 13, 1991. Respondent became aware of the code report "seven days after the sale".(Pet App. Q page 91), (Pet App. O three page report).

At trial Respondent presented a 2 page code report. Dated June 2, 1992, 2 days before trial.(Pet App.P two page code report).

The signifigance of the page containing the June 20, 1991 date, which was not submitted into evidence by either counsellor, is seen in the Attorney's letters; "Respondent's counsel stated: "Given the code report, the property was properly advertised & sold as a single family".(Pet. App. Attached to Pet. Reply to Respondents Brief in opposition, 1A, 1b, 1C, 2a, 2b, 2C, 2D).

The Attorney's letters also show, that after advising Respondent that the property had been advertised as a single family during November 1990(6 months prior to the code report being issued), Respondent shifted the blame in that an appraisal "treated the property as a single family".

However,at deposition Respondent,(as shown in Petitioners petition & Petitioners Reply Brief), admitted that "All meetings & discussions with the appraiser & others at the bank, suggesting to treat the property as a single-family, "were all after the sale"..,

Further, the trial Exhibit sheet reveals

that Petitioners counsel "did not present into evidence the 3 page code report he had taken at deposition".(Pet.App M).

Further, the U.S.Bankruptcy clerk "Mary Jane Leary", documented the evidence notebook for Petitioners after trial, & could not document the 3 page code report because it was not in the evidence notebook.(Pet.App H, facts 1 thru 6).

The Trial exhibit sheet, the 2 page code report at trial, the 3 page code report taken at deposition support Petitioners argument., & per Bankruptcy Rule 9024 60b the trial judge's decision should have been Void.

Petitioners argue here that: All the above was part of the record. Additionally, in response to Respondents Brief in opposition Petitioners "did not misstate".

The record indicates that evidence was not before the trial judge during trial,"but shold have been" in order for Petitioners to have recieved a Fair Trial. The record shows that Petitioners Rights were violated.,thus, their rights to due process were violated.

REASONS FOR GRANTING THE WRIT, II.

Petitioner's "Questions Presented" in Writ of Certiorari stated: "If other evidence during trial is being "portrayed" to exist in the evidence notebook which the trial judge reads from, but does "not exist" in the note book., is the trial judge's decision void per Bankruptcy Rule 9024 60b & as a result were Petitioners Rights to a Fair Trial violated.

The Transcript reveals: Petitioners counsel presents a bundle of papers at trial., "No Exhibit # is mentioned or indicated".

"The trial judge even asks, Have these been included in the book?

Petitioners Counsel responded, "Yes".
The trial judge asks, "where are we in the book then?
Petitioners counsel then: Guides the trial judge into the respondents side of the note-book, He says, Your Honor, they're the same as defendants' 1 & 2, & they may be easier to use in that form(Pet App H facts 1-6).

The trial Exhibit sheet reveals "no check marks on petitioners side(Pet App.M).
The Bankruptcy clerk documented the notebook for petitioners, she could only document a portion of the November 90 appraisal which contained "No Exhibit Stamp".

"The Trial Judge" in the transcript tells any reasonable person that; The evidence is not in the notebook.

Petitioners counsel, in the transcript shows any reasonable person that; He attempts to "Portray" that evidence is in the notebook, but in fact the record shows it is not".

"In response to Respondents Brief in opposition, Petitioners Argue, the claims are not incomprehensible".

REASONS FOR GRANTING THE WRIT III.

Petitioner's questions presented in Writ of Certiorari shown in Question #5 in part was, "If oral argument had been granted".

"Respondent misinterpreted petitioners question to this Court.

Petitioner's question was designed to show this Honorable Court that, If Oral argument had been granted(Petitioners were never given the opportunity), Petitioners believed as shown in the facts in this brief & Reply brief & Petition that; the issues that were presented could have & should have been resolved prior to the U.S. District Court Order in 1993(Pet App A, which has been shown to be in error). Or, could have & should have been resolved in the U.S. Court of Appeals

(Pet App H pages 9, 10 15 & 16).,& (briefs & reply briefs on appeal to U.S. District court & motions & briefs on appeal to U.S. Court of appeals pages 27 & 31).

Petitioners argue here to this Honoable Court that: "If Oral Argument had been granted petitioners would have shown that the opinion of the U.S. Court of appeals was clearly erroneous & in error in that: "Plaintiffs auctioneer witnesss "Only Testified" that if the property were advertised as a two family, it would have attracted a "different audience".(Pet App G page 9 1st parag)

PETITIONERS ARGUE HERE THAT: It would have been shown that he was petitioners witness & that Petitioners were very familiar with his testimony., & that He "Also Testified" that he appraised petitioners property as a "two-family" on two occasions, 1988 & 1991., & He also testified that two-families are" worth more than single families"., & petitioners would have made the argument that the property would have produced a "higher price". (Pet App N page 113 line 6 thru 22, & page 118 line 11 thru line 14).

Additionally, if Oral argument had been granted Petitioners would have pointed out to the U.S. Court of Appeals that its opinion was clearly erroneous & in error in that:

"U.S.Court of appeals stated that Petitioners brief was vague & myraid & completely unsupported by the record(Pet App G page 3 footnote).,it further stated that "The burden is on appellants to prove that the bankruptcy court's findings are clearly erroneous"(Pet App G, pg.4 last paragraph).

"Petitioners would have argued there & Now argue to this Honorable Court that":

By the U.S. Court of Appeals blanketing Petitioners supporting facts & evidence, its error by doing so was clearly in error & clearly erroneous in that:

Petitioners also showed the U.S. Court of appeals & U.S. District Court on appeal that;

"It was stipulated at trial that the Respondent after selling the property to themselves as a "Single Family", Respoodent insured the property as a "Two-Family" the day After the Sale."(Pet. Briefs & Reply Briefs on appeal to U.S. District Court & on Page 33 of Brief on appeal to U.S. Court of Appeals, all of which pointed out the areas of the trial transcript).(Petitioners briefs were volumous & not attached).

CONCLUSION

For all the foregoing reasons shown in this brief, & Petitioners Reply to Respondents Brief in Opposition & Petitioners Petition, the Writ for Certiorari should be Granted.

Dated February 23, 1996

RESPECTFULLY SUBMITTED

Richard & Linda Simone, Pro-Se
11 Ida Road
Worcester, Ma. 01604
Tel: (508) 752-0795